92-1447

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

In re NORMAN A. MOSCOWITZ,

Petitioner,

v.

GILBERT S. MERRITT,
Chief Judge, United States Court
of Appeals for the Sixth Circuit,

DAMON J. KEITH,
Circuit Judge, United States Court
of Appeals for the Sixth Circuit, and

PIERCE LIVELY,
Senior Circuit Judge, United States
Court of Appeals for the Sixth Circuit,

Respondents.

ON A PETITION FOR A WRIT OF PROHIBITION OR MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, THE HONORABLE CHIEF JUDGE GILBERT S. MERRITT, THE HONORABLE CIRCUIT JUDGE DAMON J. KEITH, AND THE HONORABLE SENIOR CIRCUIT JUDGE PIERCE LIVELY

PETITION FOR A WRIT OF PROHIBITION OR MANDAMUS

Gerald J. Houlihan
(Counsel of Record)
David T. Azrin
GREENBERG, TRAURIG,
HOFFMAN, LIPOFF, ROSEN &
QUENTEL, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Attorneys for Petitioner

March 2, 1993

QUESTIONS PRESENTED

A panel of the United States Court of Appeals for the Sixth Circuit (Merritt, Keith and Lively) has, *sua sponte*, reopened the habeas corpus proceeding in the extradition of John Demjanjuk even though Demjanjuk has already been extradited, tried and convicted of war crimes by an Israeli court. The questions presented are:

1. Whether the Sixth Circuit has jurisdiction to reopen the extradition after Demjanjuk has already been extradited, tried and convicted in Israel and all newly discovered evidence is now being considered by the Israeli Supreme Court?

2. Whether the Sixth Circuit abused its judicial power by failing to remand the proceeding to the district court for initial determination?

3. Whether the Sixth Circuit abused its judicial power by delegating the proceeding to a special master where there is no extraordinary reason why the Sixth Circuit is not capable of handling the proceeding?

4. Whether the Sixth Circuit procedure for conducting the investigation violates the due process rights of the government attorneys whose conduct is the subject of the investigation?

5. Whether the allegations of non-disclosure in discovery meet the legal standard for fraud upon the court to justify reopening a habeas proceeding?

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OPINIONS BELOW

The following opinions have been entered in the extradition,[1/] denaturalization,[2/] deportation,[3/] and Freedom of Information Act[4/] proceedings relating to Demjanjuk. In addition, the Sixth

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1/ Extradition

1. *In re Extradition of Demjanjuk*, 584 F. Supp. 1321 (N.D. Ohio 1984).

2. *In re Extradition of Demjanjuk*, 603 F. Supp. 1463 (N.D. Ohio 1984).

3. *In re Extradition of Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio), *appeal dismissed*, 762 F.2d 1012 (6th Cir. 1985).

4. *In re Extradition of Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio), *habeas proceeding*, *Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

5. *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986).

2/ Denaturalization

1. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

2. *United States v. Demjanjuk*, 103 F.R.D. 1 (N.D. Ohio 1983)

3. *United States v. Demjanjuk*, No. C77-923 (N.D. Ohio Feb. 12, 1985) (unpublished opinion).

4. *United States v. Demjanjuk*, 767 F.2d 922 (6th Cir. June 28, 1985) (unpublished opinion) (LEXIS), *cert. denied*, 474 U.S. 1034 (1985).

5. *United States v. Demjanjuk*, 762 F.2d 1012 (6th Cir. April 17, 1985) (unpublished opinion) (LEXIS).

3/ Deportation

1. *In re Demjanjuk*, No. A8 237 417 (Immigration Court May 23, 1984), *aff'd*, (B.I.A. Feb. 14, 1985), *aff'd*, *United States v. Demjanjuk*, 767 F.2d 922 (6th Cir.), *cert. denied*, 474 U.S. 1034 (1985).

4/ Freedom of Information Act Requests

1. *Nishnic v. United States Dep't of Justice*, 671 F. Supp. 771 (D.D.C.), *later proceeding*, 671 F. Supp. 776 (D.D.C.), *aff'd*, 828 F.2d 844 (D.C. 1987) (unpublished opinion) (LEXIS).

2. *Nishnic v. United States Dep't of Justice*, No. 86-2802-LFO, (D.D.C. Jan. 26, 1990) (unpublished opinion) (LEXIS).

Circuit has entered Orders dated June 5, 1992, August 17, 1992, August 31, 1992, and December 2, 1992 (included in the Appendix) relating to the reopening of the habeas corpus proceeding.

JURISDICTION

The Orders sought to be reviewed are the Sixth Circuit's Orders dated June 5, 1992, August 17, 1992, and August 31, 1992, reopening the extradition proceeding and referring the matter to a special master, as well as the Sixth Circuit's Order dated December 2, 1992, denying Petitioner's Motion to Quash and Suggestion for Hearing En Banc. Jurisdiction is conferred upon this Court under the All Writs Act, 28 U.S.C. § 1651.

This Court has jurisdiction to issue a writ of prohibition or mandamus to a lower court when the lower court is acting in a manner which constitutes a clear abuse of judicial discretion and a usurpation of judicial power. *Mallard v. United States Dist. Court for the Southern Dist. of Ohio*, 490 U.S. 296, 309 (1989); *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957); *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945); *Maryland v. Soper*, 270 U.S. 9, 27 (1926). As discussed more fully below, the Sixth Circuit's reopening of the extradition, the reference to a special master, and the manner in which the Sixth Circuit is conducting the proceeding, are abuses of the Sixth Circuit's discretion. In addition, the Sixth Circuit's unwarranted judicial action threatens to embarrass the Executive Branch in the conduct of its foreign relations and compliance with treaty obligations with the nation of Israel. *Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943). Accordingly, supervisory control of the Court of Appeals for the Sixth Circuit is necessary to proper judicial administration in the federal system.

STANDING

Norman A. Moscowitz, like the other government attorneys named in the Sixth Circuit's August 17, 1992 Order, is a non-party to the case below. However, the stated purpose of the Sixth Circuit

investigation is to determine whether "*lawyers* from the Department of Justice engaged in prosecutorial misconduct." Order, Aug. 17, 1992 (emphasis added) (Appendix). Accordingly, Petitioner has a compelling interest in the case and a significant stake in the outcome. Further, he has no other remedy to avoid any harm to him from an adverse decision.

Because the Sixth Circuit intends to make a finding as to whether the Petitioner engaged in "prosecutorial misconduct," he has a personal stake in the controversy.[5/] This direct and personal interest gives Norman A. Moscowitz standing to raise these procedural and jurisdictional objections to this proceeding. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *In re Oliver*, 333 U.S. 257, 272 (1948); *Professional Air Traffic Controllers Org. (PATCO) v. Federal Labor Relations Auth.*, 672 F.2d 109, 110 (D.C. Cir. 1982).

Although a non-party is normally not permitted to appeal a court's order, a non-party may appeal where the non-party has been required to participate in the proceedings below, the non-party has a personal stake in the outcome of the litigation, and the equities of the case weigh in favor of hearing the appeal. In such cases, the non-party is permitted to appeal the court's order as a *de facto* party. *See, e.g., EEOC v. Pan American World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir.), *cert. denied*, 111 S.Ct. 55 (1990); *Kenny v. Quigg*, 820 F.2d 665 (4th Cir. 1987); *Bank of America v. M/V Executive*, 797 F.2d 772 (9th Cir. 1986); *SEC v. Wencke*, 783 F.2d 829 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Martin-Trigona v. Shiff*, 702 F.2d 380 (2d Cir. 1983); *SEC v. Lincoln Thrift Ass'n.*, 577 F.2d 600 (9th Cir. 1978); *West v. Radio-Keith-Orpheum Corp*, 70 F.2d 621 (2d Cir. 1934); *see generally* 15A C. A. Wright & A. R. Miller, *Federal Practice and Procedure*, § 3902.1 (1992).

5/ Petitioner was an attorney in the Office of Special Investigations (OSI) from 1979 until 1982 and represented the government in the denaturalization proceedings only. He is at present an Assistant United States Attorney in the Southern District of Florida.

Here, Petitioner may be considered a *de facto* party because he has been ordered by the Sixth Circuit to participate in the proceedings below and he has a personal stake in the outcome of the proceeding. Petitioner and three other government attorneys were specifically named in the Sixth Circuit's August 17, 1992 Order. He has been called to testify to defend his actions and the government's actions.[6/] He has been compelled, pursuant to subpoena, to produce documents in his possession.

Furthermore, a non-party may seek appellate review of a lower court proceeding prior to entry of a final order by means of a petition for an extraordinary writ where the non-party will suffer an "injury in fact" sufficient to show a personal stake in the outcome of the proceeding and where the interests sought to be protected are arguably "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Radio & Television News Ass'n v. United States Dist. Court for the Central Dist. of Cal.*, 781 F.2d 1443, 1445 (9th Cir. 1986) (*quoting Ass'n of Data Processing Service Org.*, 397 U.S. 150 (1970)); *see also Journal Publishing Co. v. Honorable E. L. Mechem*, 801 F.2d 1233 (10th Cir. 1986); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); *Petrol Stops Northwest v. United States*, 571 F.2d 1127 (9th Cir. 1978).

This Court has stated that injury to reputation by itself is not a liberty interest protected under the Fourteenth Amendment. *Siegert v. Gilley*, 111 S.Ct. 1789 (1991). Nevertheless, this Court has also held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [Due Process] Clause must be satisfied." *Goss v. Lopez*, 419 U.S. 565 (1975); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Here, the purpose of the Sixth Circuit's action is to inquire into the propriety of Petitioner's conduct

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6/ Petitioner testified before the special master on January 14-15, 1993, in Nashville, Tenn.

and the conduct of the other named government attorneys. It is, therefore, conducting what amounts to a disciplinary proceeding against Petitioner and the other government attorneys. *Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984). Any determination by the Sixth Circuit that Petitioner engaged in prosecutorial misconduct would not only cause irreparable harm to his reputation, but could also lead to further disciplinary proceedings against him. In these circumstances, Petitioner is entitled to minimal due process protections. The appropriate means for him to raise any procedural or jurisdictional objections to the proceedings is by petition for writ of mandamus.

It is appropriate for an attorney who is the subject of a hearing on alleged misconduct to seek appellate review of the proceedings by means of a petition for writ of mandamus. In a similar case, *Bolte v. Home Ins. Co.*, 744 F.2d 572 (7th Cir. 1984), a district court entered an order which included a finding that a lawyer involved had engaged in "reprehensible" conduct. The parties settled the lawsuit, but the district court refused to vacate its order which chastised the attorney. The attorney sought appellate review of the district court's finding by means of both a petition for writ of mandamus as well as direct appeal of the final order. The court stated that he did not have standing to seek review by a direct appeal. However, the Seventh Circuit held that a petition for writ of mandamus was the appropriate means for the attorney to seek appellate review of the district court proceeding. The court emphasized that the attorney's interests were directly affected by the order. The court explained that although the district judge did not name the attorney as a party, "the district judge in effect began a disciplinary proceeding against the lawyers . . . although sanctions in the usual sense were not imposed." *Bolte*, 744 F.2d at 572. *See also Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127 (2d Cir. 1989) (attorney criticized in district court opinion does not have standing to take direct appeal of final order); *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (non-party has standing to seek appellate review by petition for writ of mandamus although non-party does not have standing to appeal final judgment).

While the Department of Justice maintains that Petitioner and the other government attorneys engaged in no misconduct, it is not an adequate representative of their individual interests. Its obligation is to represent the United States. In recognition of that difference in interests, the Department has authorized separate counsel for these attorneys.

That the Department does not represent the individual interests of the attorneys is shown by some of the positions which the Department has taken so far in this litigation. For example, the Department has not objected that the proceeding violates the due process rights of the attorney witnesses even though they have been denied certain ordinary protections.[2/] While the Department agrees that the Sixth Circuit is acting *ultra vires* and lacks jurisdiction, it has elected not to pursue such objections until after judgment. Further, the Department of Justice did not seek *en banc* review of the Sixth Circuit's initial orders reopening the proceeding and has not objected to the reference to the special master. Moreover, the Department of Justice has not sought Supreme Court review of the substantial jurisdictional defects in this Sixth Circuit proceeding, even though it concurs that the Sixth Circuit is clearly acting beyond the scope of its authority.

Petitioner has no further recourse in the Sixth Circuit. Petitioner has already put forth these objections to the Sixth Circuit. See Order, United States Court of Appeals for the Sixth Circuit (denying Petitioner's Motion to Quash and Suggestion For Hearing En Banc), Dec. 2, 1992 (Appendix). Indeed, his only practical remedy lies with this Court. For these reasons, Petitioner has standing to raise these procedural and jurisdictional objections by a petition for a writ of prohibition.

2/ During the proceedings before the special master, the Department opposed the request of counsel for the "witnesses" (the government attorneys) that they be permitted to question witnesses directly.

STATEMENT OF THE CASE

In 1977, the United States brought an action against John Demjanjuk under the Immigration and Nationality Act to revoke the certificate of naturalization of John Demjanjuk and to vacate the order admitting him to United States citizenship. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982). This action alleged, among other things, that Demjanjuk concealed his role as a Nazi SS death camp guard when he immigrated and applied for citizenship. Specifically, the action alleged that Demjanjuk served as a Nazi death camp guard at the Treblinka and Sobibor death camps and was a member of the SS guard unit headquartered at the Trawniki training camp. The action alleged that at Treblinka, Demjanjuk (who was known as "Ivan the Terrible"), was responsible for the operation of the gas chambers where hundreds of thousands of Jews were murdered. The district court found that the evidence, which included Demjanjuk's SS identification card issued at Trawniki, eyewitness identifications by survivors and a former German SS officer, Demjanjuk's admission that he received a "blood group" tattoo (which was given only to Nazi SS personnel), and Demjanjuk's inability to provide a credible alibi as to his whereabouts during the war, all supported the allegations that Demjanjuk was a Nazi camp guard at Trawniki and Treblinka. Because of his findings regarding Trawniki and Treblinka, each of which was an independent basis for denaturalization, the district court did not reach the issue of whether Demjanjuk was at Sobibor. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

Subsequent to the denaturalization action, the United States brought a deportation action against Demjanjuk. *In re Demjanjuk*, No. A8 237 417 (Immigration Court May 23, 1984), *aff'd*, (B.I.A. Feb. 14, 1985), *aff'd*, *United States v. Demjanjuk*, 767 F.2d 922 (6th Cir.), *cert. denied*, 474 U.S. 1034 (1985).

At the request of Israel, Demjanjuk's extradition was initiated by the United States in 1983 in the Northern District of Ohio pursuant

to the Convention on Extradition Between the United States and Israel. The evidence presented consisted of the statements of six survivors of Treblinka who had identified Demjanjuk in photographic identifications. The district court (the same district court judge who heard the denaturalization) determined that the request satisfied the probable cause standard under the United States-Israel extradition treaty and applicable United States law to justify Demjanjuk's extradition to stand trial in Israel. *In re Extradition of Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985).

Prior to his extradition, Demjanjuk filed a petition for writ of habeas corpus to Joseph Petrovsky, Warden, Federal Prison Medical Facility, Springfield, Mo., *Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), as well as a petition for writ of habeas corpus to Honorable Edwin Meese, United States Attorney General, and Honorable George Schultz, Secretary of State. *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986). These requests were denied and in 1986 Demjanjuk was extradited to stand trial in Israel.[8/] In 1988, he was convicted. This conviction is currently on appeal before the Israeli Supreme Court.

In about 1991, new information relating to death camp guards at Treblinka, Sobibor, and other death camps came out of the former Soviet Union. This information indicated that there was a guard by the name of Ivan Marchenko who operated the gas chambers at Treblinka and was known as "Ivan the Terrible." At the same time, other new information from the former Soviet Union and West German archives provided further proof that Demjanjuk was a Nazi camp guard at the Sobibor and Majdanek death camps and at the

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[8/] The decision to extradite is reviewable only by petition for writ of habeas corpus and is limited to a determination of "whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

Flossenburg forced labor camp. The Israeli Supreme Court is currently considering the new information.[9/]

In June, 1992, a panel of the Sixth Circuit (Merritt, Keith, and Lively) *sua sponte* reopened the habeas proceeding, based upon "numerous recent press reports and articles" and its own previous study of the record, to determine whether it had mistakenly affirmed the denial of Demjanjuk's habeas petition due to a fraud on the court committed by the government. Rather than remand the investigation to the district court which presided over both the denaturalization and extradition proceedings, the Sixth Circuit appointed a special master to conduct the investigation and issue a report and recommendation.

The special master, the Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, was directed to examine not only the extradition, but all proceedings, to determine whether the government attorneys involved in Demjanjuk's denaturalization, deportation, and extradition proceedings, including Petitioner, engaged in "prosecutorial misconduct" rising to the level of "fraud upon the court" by the concealment and non-disclosure of evidence relating to "Ivan Marchenko." In its Order dated August 17, 1992, the Sixth Circuit named as "witnesses" Allan Ryan, Norman Moscowitz, George Parker, and John Horrigan. These were four government attorneys involved in the denaturalization proceedings against Demjanjuk. During the course of the proceedings before the special master, two other government attorneys, Martin Mendelsohn and Bruce Einhorn, have been called as "witnesses." In addition, depositions were taken by Demjanjuk of four other former government attorneys and three former investigators at the Office of Special Investigations.

[9/] This includes evidence which Demjanjuk considers exculpatory as well as other documentary evidence which shows that he was a Nazi SS death camp guard at several camps. It should be noted that none of the new evidence casts any doubt on the fact that Demjanjuk was a Nazi SS death camp guard; the only question now raised is whether he was at the Treblinka camp in addition to the other death camps.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Has Abused Its Judicial Power Because The Sixth Circuit Lacks All Jurisdiction To Reopen The Extradition Proceeding After Demjanjuk Has Already Been Extradited To Stand Trial In Israel.

Here, the Sixth Circuit has, by its own account, reopened the extradition because of its reading of "numerous recent press reports and articles" and its previous review of the record.[10/] In its Order of August 17, 1992, the Sixth Circuit stated it was ordering further proceedings based on "its inherent power *to grant relief*, for 'after-discovered fraud...'"(emphasis added.) However, the Sixth Circuit has no power to grant any further relief in the extradition proceeding. Because Demjanjuk was extradited, the Sixth Circuit cannot enter any order which will have any practical effect on Demjanjuk's status in any respect.[11/] If the Sixth Circuit reverses its earlier decision in the habeas corpus proceeding, the decision will be purely advisory with no practical consequences. *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975); *Danzy v. Johnson*, 417 F. Supp. 426, 432 (E.D. Pa. 1976), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978).

[10/] The extraordinary nature of this action is highlighted by the fact that Demjanjuk, who has initiated numerous actions before numerous courts, did not seek this one. He has been litigating these issues before the Israeli Courts. He also has pending an action before the District Court in the Northern District of Ohio to overturn his denaturalization on the ground it was procured by fraud. Since the Sixth Circuit's action, Demjanjuk has moved to stay this District Court proceeding.

[11/] Demjanjuk will not be permitted to reenter the United States without permission from the Attorney General because he has been adjudged deportable based upon his misrepresentations in his visa applications. 8 U.S.C. §§1101(g), 1326; *In re Demjanjuk*, No. A8 237 417 (Immigration Court May 23, 1984), *aff'd*, (B.I.A. Feb. 14, 1985), *aff'd. United States v. Demjanjuk*, 767 F. 2d 922 (6th Cir.), *cert. denied*, 474 U.S. 1034 (1985). This adjudication remains unchallenged. The evidence and finding that Demjanjuk was a member of the SS guard unit at Trawniki is undisputed.

In sum, as Demjanjuk has been extradited, any objections he may have to the extradition are moot in the United States. The fundamental requisite of federal jurisdiction is that an actual case or controversy must exist at all stages of review. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). None exists here. All that the court of appeals can do is issue an advisory opinion expressing its view as to whether misconduct occurred. Of course, a court is not authorized to issue merely advisory opinions and is without power to decide questions that cannot affect the rights of litigants in the case before them. *Preiser v. Newkirk*, 422 U.S. at 403; *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

In the proceeding below, Demjanjuk has argued that the "meaningful relief" which he seeks is an order vacating the previous denial of a writ of habeas corpus and "an order to an appropriate United States official over whom it has jurisdiction to demand Petitioner's return under the extradition treaty" on the ground that his extradition violated the rule of specialty. (*See* Demjanjuk's Response to Petitioner's Motion to Quash and Suggestion for Hearing En Banc, served November 16, 1992, at 4). Contrary to Demjanjuk's suggestion, the Sixth Circuit does not have the authority to issue an order compelling the President of the United States to make such a demand.

The final decision to extradite is within the exclusive province of the Executive Branch. It is within the exclusive province of the Executive Branch to make any objection to the demanding country that the extradition or the trial in the demanding country will violate the terms of the treaty or the rule of specialty. *Spatola v. United States*, 925 F.2d 615 (2d Cir. 1991); *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990); *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980); *Sindona v. Grant*, 619 F.2d 167, 176 (2d Cir. 1980); *Shapiro v. Secretary of State*, 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd*, 424 U.S. 614 (1976). Accordingly, as stated, the Sixth Circuit can do no more than offer an advisory opinion to the Executive Branch.

This rule of non-interference is required because compliance with treaty obligations necessarily implicates foreign policy interests of the United States. *Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977). For this reason, it is "manifestly improper" for the courts to interfere in such affairs. *Peroff*, 563 F.2d at 1103.

Demjanjuk is not without a remedy for the claims now raised by the Sixth Circuit. Indeed, he has raised the identical claims before the Supreme Court of Israel. All of the information regarding "Marchenko" has been presented to the Israeli Supreme Court as part of his appeal. If Demjanjuk seeks to present evidence to show that a different person may have committed the crime, this evidence must be presented to the courts in the extraditing country. *Ahmad v. Wigen*, 910 F.2d 1063 (2d Cir.), *stay denied*, 497 U.S. 1054 (1990); *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986), *cert. denied*, 479 U.S. 882 (1986); *Eain v. Wilkes*, 641 F.2d 504, 511 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *Peroff v. Hylton*, 563 F.2d 1099, 1101 (4th Cir. 1977); *In Re Extradition of Koskotas*, 127 F.R.D. 13, 25 (D. Mass. 1989). It is not for a United States court to supervise the integrity of the judicial system of Israel. To allow otherwise would violate notions of comity between nations. *Spatola v. United States*, 741 F. Supp. 362, 371 (E.D.N.Y. 1990), *aff'd*, 925 F.2d 615 (2d Cir. 1991). The lower federal courts have uniformly dismissed objections to extradition under the doctrines of mootness and territorial jurisdiction where those objections were raised after the accused was extradited. *See Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986); *United States v. Sarmiento-Rozo*, 592 F.2d 1318, 1320 (5th Cir. 1979); *Hurt v. Balkcom*, 224 F.2d 21, 23 (5th Cir.), *cert. denied*, 350 U.S. 868 (1955); *Scot v. Merola*, 555 F. Supp. 230, 232 (S.D.N.Y. 1983); *Danzy v. Johnson*, 417 F. Supp. 426, 435 (E.D. Pa. 1976), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978); *see also Watts v. State*, 456 N.W.2d 683 (Iowa Ct. App. 1990); *Commonwealth v. Caffrey*, 508 A.2d 322, 324 (Pa. 1986).

The Executive Branch has been informed of all of the newly discovered evidence from the Soviet Union. Nevertheless, the United States has not raised any objection to the Israeli government. Rather,

the United States has taken the position that the matter should be resolved by the Israeli Supreme Court, which has all the relevant evidence before it. (*See* Government's Second Brief, filed August 3, 1992, at 42). That position is clearly correct. Moreover, there is no compelling equitable reason for the Sixth Circuit to seek to overcome its jurisdictional limitations in this matter. Demjanjuk will receive a full and fair hearing before the Israeli Supreme Court concerning all of the newly-discovered evidence as well as any issues concerning the propriety of his extradition and trial.

II. The Sixth Circuit Is Required To Remand The Proceeding To The District Court For Initial Determination.

This Court has held that an investigation of fraud on the court must be determined in the first instance by the court upon whom the fraud was allegedly committed. *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575, 578, 580-81 (1946); *Hatfield v. King*, 184 U.S. 162 (1902); *Weisman v. Charles F. Smith Management, Inc.*, 829 F.2d 511, 513 (4th Cir. 1987). This would require the usual and ordinary remand to the district court that originally considered the cases. Here, the District Court for the Northern District of Ohio conducted both the denaturalization and extradition proceedings. All evidentiary and discovery matters took place before that court. However, without any explanation, the Sixth Circuit refused to remand this investigation to the district court, characterizing such a remand as "unduly cumbersome."

Generally, it is inappropriate for an appellate court to perform any function which relates to the subject of fact-finding. Rather, an appellate court normally only has authority to review the record below. *United States v. Reis*, 327 U.S. 742, 747 (1945); *Raulie v. United States*, 400 F.2d 487, 509 (10th Cir. 1968); *Litton v. United States*, 177 F.2d 416, 417 (8th Cir. 1949), *cert. denied*, 339 U.S. 921 (1950). An appellate court generally is not authorized to make findings of fact or to apply the law in the first instance. This is the role of the trial court. *Goland v. Central Intelligence Agency*, 607

F.2d 339, 371 (D.C. Cir. 1978) *cert. denied*, 445 U.S. 927 (1980); *Lam Man Chi v. Bouchard*, 314 F.2d 664, 674 (3d Cir. 1963).

In every case involving an alleged "fraud on the court" committed during pretrial proceedings, the federal courts have held that the investigation of the "fraud on the court" should be conducted by the trial court, rather than the appellate court. *Hatfield v. King*, 184 U.S. 162, 168 (1902); *Rocovich v. United States*, 933 F.2d 991, 995 n.6 (Fed. Cir. 1991); *Weisman v. Charles E. Smith Management, Inc.*, 829 F.2d 511, 513 (4th Cir. 1987); *Virgin Islands Housing Authority v. David*, 823 F.2d 764, 767 n.6 (3d Cir. 1987) (*citing H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1122 (6th Cir. 1976)); *Banks v. Multi-Family Management, Inc.*, 554 F.2d 127, 129 (4th Cir. 1977); *Toscano v. Commissioner of Internal Revenue*, 441 F.2d 930, 937 (9th Cir. 1971); *Brothers Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 210 (5th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); *Dausuel v. Dausuel*, 195 F.2d 774, 775 (D.C. Cir. 1952). This result obtains even where the trial court's judgment has already been affirmed on appeal. *Harre v. H.A. Robins Co.*, 866 F.2d 1303 (11th Cir. 1989); *A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 85-86 (S.D.N.Y. 1950).

In *Hatfield*, this Court articulated this fundamental principle, stating: "this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence." *Hatfield v. King*, 184 U.S. 162, 168 (1902). More recently, the Fourth Circuit reaffirmed this principle in *Weisman v. Charles E. Smith Management, Inc.*, 829 F.2d 511, 514 (4th Cir. 1987). The Fourth Circuit stated that: "the district court is the proper forum to determine in the first instance whether there is sufficient basis to overturn the judgments on the grounds raised [fraud on the court]. That court is in the best position to decide whether any fraud was perpetrated upon it or other untoward action occurred . . ." *Weisman*, 829 F.2d at 514.

The Sixth Circuit's reliance in its August 17, 1992 Order on this Court's decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), *overruled in part*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976), is misplaced. Contrary to the Sixth Circuit's suggestion, *Hazel-Atlas* does not give the Sixth Circuit authority to conduct this proceeding rather than remanding it to the district court. In *Hazel-Atlas*, this Court specifically did not decide this issue. This Court emphasized that "the relevant facts as to the fraud were agreed upon by the litigants" in that case. 322 U.S. at 249. For that reason, this Court stated that it would be unnecessary ("cumbersome and dilatory") to remand the investigation to the district court for initial determination. Nevertheless, this Court specifically stated that it left open the issue of "whether, if the facts relating to the fraud were in dispute and difficult of ascertainment the circuit court here should have held hearings and decided the case or should have sent it to the district court for decision." 322 U.S. at 250 n.5. This proceeding is distinguishable from *Hazel-Atlas* because the facts here are disputed. Unlike *Hazel-Atlas*, it is necessary to remand the proceeding to the district court to conduct a fact-finding investigation.

Standard Oil Co. of Cal. v. United States, 429 U.S. 17 (1976), provides further authority for the view that an investigation of a fraud on the court should be sent to the district court for initial determination. In *Standard Oil*, this Court specifically disapproved the procedure outlined earlier in *Hazel-Atlas*, 322 U.S. 238 (1944), whereby a party was required to seek appellate leave before filing a Rule 60(b) motion for relief from judgment in the district court after judgment has been affirmed on appeal. Rather, this Court held in *Standard Oil* that a Rule 60(b) motion need not be presented as an initial matter to the appellate court because: "the trial court is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." 429 U.S. at 20.

Demjanjuk himself has implicitly acknowledged that the district court is the proper forum to decide these issues when he filed a complaint in the Northern District of Ohio raising these same issues.

His complaint alleges that the United States and various federal officials intentionally concealed and misrepresented material evidence favorable to Demjanjuk. *Demjanjuk v. United States*, No. 88-0864 (N.D. Ohio filed Apr. 8, 1988). The complaint seeks to overturn the judgments revoking his citizenship, ordering him deported, and finding him extraditable to Israel. This proceeding is ongoing.

In its Order of August 17, 1992, the Sixth Circuit characterized remand to the district court as "cumbersome and dilatory" (*quoting Hazel-Atlas*). However, that is not correct under the circumstances of this case. Here, the reference of this case to the special master, who lacks familiarity with the nearly fifteen years of proceedings relating to Demjanjuk's denaturalization and extradition, is not a speedier and more efficient mechanism for resolving these issues than remand to the district court, which originally heard both the denaturalization and extradition.

The district court is the proper forum to address the allegations of misconduct because only the district court is familiar with the evidence and pretrial discovery issues in this lengthy matter. The district court heard the denaturalization and extradition cases, where the misconduct is alleged to have taken place. During the course of these proceedings, many discovery issues and disputes arose and were resolved by the district court. Only that court has the personal knowledge as to the significance and basis for its rulings. Moreover, only the district court knows how any alleged misconduct might have altered its final decision.

III. The Sixth Circuit Has Abdicated Its Judicial Function By Delegating This Proceeding To A Special Master.

Even assuming it is appropriate for the Sixth Circuit to conduct this investigation, a proposition the Petitioner vigorously contests, the evidence must be presented directly to the Sixth Circuit, rather than to a special master, for determination. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1975); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 517 (3rd Cir. 1948), *cert. denied*, 335 U.S. 912 (1949).

The Sixth Circuit's authority derives from article III of the Constitution. This provision places the judicial power of the United States in the federal courts. Accordingly, article III requires that, except in extraordinary circumstances not present here, the courts cannot delegate the determination of the basic issues in a judicial proceeding to a special master. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957); *In re Bituminous Coal Operators' Ass'n, Inc.*, 949 F.2d 1165, 1168 (D.C. Cir. 1991); *In re United States*, 816 F.2d 1083, 1086-91 (6th Cir. 1987).

This Court has held that a special master cannot be used to determine the basic issues involved in a litigation. For example, in *La Buy*, 352 U.S. 256-58, the lower court had referred a non-jury anti-trust action to a special master to take evidence and enter a report with recommended findings of fact and conclusions of law. 352 U.S. at 253. This Court held that the order of reference constituted an abuse of discretion and usurpation of judicial power because it: "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation. The use of masters is to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause, and not to displace the court." 352 U.S. at 256. The basic issues can only be delegated to a special master in "extraordinary" circumstances. 352 U.S. at 256. No such extraordinary circumstances exist in the present case.

"Extraordinary" circumstances means that there must be an extraordinary reason why the court is not *capable* of handling the matter itself. *La Buy*, 352 U.S. at 256. It does not mean that the case is "extraordinary" because it involves novel, sensational or difficult issues. In *La Buy*, this Court rejected the contention that the complexity of the issues, congestion of the court, the length of time required to try the cases, and the illness of the presiding judge constituted sufficient reason to refer two complex antitrust cases to a special master for a recommendation and report. *La Buy*, 352 U.S. at 256. The only situation which this Court indicated might constitute "extraordinary" circumstances rendering a court incapable of handling a matter is one in which it is necessary to perform difficult

mathematical calculations for an accounting of damages. *La Buy*, 352 U.S. at 257. This rule has been embodied in Federal Rule of Civil Procedure 53(b) which provides that "in actions to be tried without a jury, save in matters of accounting or difficult computation of damages, a reference [to a special master] shall be made only upon showing that some exceptional condition requires it." Fed.R.Civ.P. 53(b). In addition, the lower federal courts have permitted delegation to a special master where the district court was not capable of handling the matter because it was necessary for the court to undertake continuing supervision of compliance with a court order that requires organizational restructuring and lengthy monitoring. *See cases cited in Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097 (3rd Cir. 1987).

Universal Oil Products Co. v. Root Refining, 328 U.S. 575 (1946), is most pertinent on this issue. There, this Court criticized the appellate court for delegating the determination of "fraud on the Court" to a special master who had conducted the investigation on a confidential basis. On remand, the appellate court decided that the evidence and testimony must be presented directly to the appellate judges who ultimately conducted their own ten-day trial. *Root Refining*, 169 F.2d at 517.

Following this Court's admonitions, the lower federal courts have applied *La Buy* to reverse orders of reference to special masters in a wide variety of non-jury trial proceedings, including contempt proceedings. *See, e.g., In re Bituminous Coal Operators' Ass'n, Inc.*, 949 F.2d 1165, 1168 (D.C. Cir. 1991); *Burlington Northern R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1072 (9th Cir. 1991); *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097 (3d Cir. 1987); *In re United States*, 816 F.2d 1083, 1091 (6th Cir. 1987); *Bennerson v. Joseph*, 583 F.2d 633, 642 (3d Cir. 1978); *Piper v. Hauck*, 532 F.2d 1016, 1019 (5th Cir. 1976). These courts have held that delegation to a special master is particularly inappropriate for determination of a non-jury proceeding which involves relatively simple factual issues turning on the credibility of witnesses. *Apex*, 818 F.2d at 1097; *Bennerson*, 583 F.2d at 642. Moreover,

delegation is inappropriate for the resolution of issues of alleged fraud. *Bradshaw v. Thompson*, 454 F.2d 75, 80 (6th Cir.), *cert. denied*, 409 U.S. 878 (1972); *In re Irving-Austin Bldg. Corp.*, 100 F.2d 574, 577 (7th Cir. 1938).

Here, the Sixth Circuit's delegation to a special master is wholly unjustified. As was done inappropriately in *La Buy*, the Sixth Circuit has directed the special master to hear evidence and enter a report with findings of fact and conclusions of law. There is no "extraordinary" reason why the Sixth Circuit is not *capable* of handling this proceeding itself. The issue here is not unusually complex or technical. It involves claims which a court is well-suited to consider and resolve. This matter involves simple factual issues and a determination of the credibility of witnesses. Accordingly, this order of reference constitutes an abdication of the Sixth Circuit's judicial function which should not be tolerated.

IV. The Sixth Circuit Procedure For Conducting This Investigation Violates The Due Process Rights Of The Government Attorneys.

The Sixth Circuit has stated that the single issue in this special master proceeding is whether the Department of Justice Attorneys "engaged in prosecutorial misconduct." Order, August 21, 1992. In light of this order, this proceeding amounts to nothing more than a disciplinary proceeding against the government attorneys. The decision will have no effect whatsoever on Demjanjuk's status, yet the decision will have a substantial effect on the government attorneys' careers and their reputations. In these circumstances, the government attorneys are entitled to the full panoply of due process protections. As this Court stated in *Goss v. Lopez*, 419 U.S. 565, 575 (1975), "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [Due Process] Clause must be satisfied." *See also Willner v. Comm. on Character and Fitness*, 373 U.S. 96 (1963); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1949).

Here, the government attorneys have not been given adequate due process protections. They have not been given notice of the charges against them nor have they been permitted to conduct discovery or to obtain evidence in their defense. Moreover, they have not been permitted to make any objections during the proceeding as to relevance. (Transcript, Hearing Before Special Master, Sept. 4, 1992, at 33). Indeed, because of a sequestration order, they have not been permitted to be present during the testimony of other witnesses and to assist counsel until after they have testified themselves. (Transcript, Hearing Before Special Master, Nov. 12, 1992, at 8; Nov. 13, 1992, at 2-5, 49-50; Order, Special Master, Dec. 9, 1992). Their counsel have not been permitted to question witnesses, but only to suggest questions to government counsel.

The fact that the government attorneys have been denominated as "witnesses" does not resolve whether they are entitled to due process protections in this proceeding. This Court rejected a similar contention in *In re Oliver*, 333 U.S. 257 (1948). In that case, a "witness" was called to testify before a grand jury investigating alleged gambling and official corruption. At the end of the witness's testimony, the judge (entitled under state law to act as a "one-man grand jury") decided that he did not believe the witness and charged the witness with contempt. This Court reversed the ruling, stating that the "witness" was entitled to notice of the charges and an opportunity to be heard in his defense before the court decided that he was lying. 333 U.S. at 273. The Court explained that the "witness" was actually the "accused" and that: "[i]n the midst of Petitioner's testimony the proceedings abruptly changed. The investigation became a 'trial,' the grand jury became a judge, and the witness became an accused charged with contempt of court . . ." *In Re Oliver*, 333 U.S. at 272. *See also Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 672 F.2d 109, 110 (D.C.Cir. 1982) (court permitted all attorneys and interested parties to defend themselves in a proceeding to determine whether an agency decision was unduly influenced by improper ex parte contacts).

Universal Oil Products Co. v. Root Refining, 328 U.S. 575 (1946), is also pertinent to this issue. In *Root Refining*, the appellate court initially appointed a special master to conduct the investigation of alleged bribery of an appellate judge. The special master conducted the investigation by examining documents in private and conducting confidential interviews. The Supreme Court chastised the appellate court for failing to provide due process protection to the persons involved stating that: "[i]f the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed." *Root Refining*, 328 U.S. at 580.

There is another severe and adverse consequence to the Sixth Circuit's inappropriate choice of procedure -- the denial of appellate rights. Indeed, had the matter been properly remanded to the district court, the adversely affected party would have an appeal *as a matter of right* to the appellate court. Now, an adversely affected party has very limited access to any appellate review. To be limited to appellate review by only the Supreme Court of the United States, with its limited jurisdiction and wide discretion, is to be effectively denied any appellate rights. The failure to remand is therefore an arbitrary denial of the statutory right to appellate review and another example of the violation of Petitioner's due process and equal protection rights. Due process and equal protection require that a statutory right to appellate review cannot be taken away arbitrarily. *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *Cochran v. Kansas*, 316 U.S. 255, 257 (1942).

Any investigation of the individual attorneys' alleged misconduct is more properly conducted by the Department of Justice's Office of Professional Responsibility. Alternatively, it should be done pursuant to the Rules of the Sixth Circuit relating to disciplinary proceedings.[12/]

[12/] Sixth Circuit Local Rule 32 provides detailed procedures for attorney disciplinary proceedings. Among other things, these procedures guarantee that the complaint must list the specific facts supporting the allegations of

In addition, due process requires that the investigation be conducted by an independent investigator rather than an interested party like Demjanjuk. The procedure adopted by the Sixth Circuit provides Demjanjuk with complete discretion to conduct discovery, select witnesses, present documentary evidence, formulate the charges, and present the evidence to the special master. (*See* Hearing Transcript, Special Master, Sept. 4, 1992, at 12-33; Order, Dec. 9, 1992). Demjanjuk, of course, has no duty to seek truth, but only to pursue his best interests in an adversary proceeding. Again, *Root Refining*, 169 F.2d 514 (3d Cir. 1948), *cert. denied*, 335 U.S. 912 (1949), is particularly instructive on this issue. In *Root Refining*, interested parties were named by the lower court as amici to represent the interests of the court in discovering the fraud. *Root Refining*, 169 F.2d at 517. This Court criticized the practice of allowing an interested party to represent the court in conducting an investigation of fraud on the court. This Court stated that: "amici selected by the Court to vindicate its honor ordinarily ought *not* to be in the service of those having private interests in the investigation." *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575, 581 (1946) (emphasis added). Upon remand, the United States Court of Appeals for the Third Circuit followed this Court's advice and appointed the United States Attorney General as a neutral third party to present the charges and witnesses to the court of appeals for determination. *Root Refining*, 169 F.2d at 520. Interested parties were permitted to participate in the examination and cross-examination. 169 F.2d at 520. *See also A.B. Dick Co. v. Mark*, 197 F.2d 498, 501 (2d Cir.

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misconduct. The procedures also require that the attorney must be provided with an opportunity to file a written response, an opportunity to participate fully in an evidentiary hearing, the opportunity to be represented by counsel, and the opportunity to present witnesses and other evidence and to confront and cross-examine any adverse witnesses. Local Rule 32(c),(d), (h). The complainant is not permitted to participate in the proceeding without permission. Local Rule 32(h)(3). Moreover, the entire proceeding is kept confidential to protect the rights of the attorney. Local Rule 32(c)(3), (h)(2). This investigation of "prosecutorial misconduct" provides none of these minimal due process protections.

1952) (district court appointed attorney general as amicus curie to conduct proceedings and call witnesses to determine whether there was a fraud on the court).

Moreover, it is particularly inappropriate for Demjanjuk to lead an investigation of alleged fraudulent misconduct because Demjanjuk comes to the court with unclean hands.[13] The undisputed evidence demonstrates that he has consistently lied to the courts and government agencies regarding his war-time activities. Putting aside the issue of his service at the Treblinka death camp, the evidence that he served with the SS in the Trawniki guard unit is unchallenged. The newly discovered documentary evidence submitted to the Israeli Supreme Court confirms his service as a death camp guard at Sobibor. Other documentary evidence shows that he served as a guard at the Majdanek death camp. In addition there are several documents from West German archives showing that he also served as a guard at the Flossenburg labor camp. Demjanjuk has misrepresented and concealed all of this criminal activity from the agencies and courts of the United States. Thus, it denigrates the courts to permit Demjanjuk to purport to represent the court's interests in investigating an alleged fraud.

V. The Sixth Circuit Has Abused Its Judicial Power By Reopening This Proceeding Because The Allegations Of Non-Disclosure In Discovery Do Not Meet The Legal Standard For Fraud Upon The Court.

Demjanjuk's allegations of misconduct, taken in a light most favorable to him, simply do not constitute "fraud on the court". The Sixth Circuit has stated here that the allegations are that the

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[13] In this very proceeding, Demjanjuk has concealed and misrepresented evidence. In 1991, Demjanjuk's son and son-in-law interviewed a witness in the Ukraine who remembered both an "Ivan Marchenko" and "Ivan Demjanjuk" as guards at Treblinka. However, in his filings with the Sixth Circuit in August 1992, Demjanjuk submitted a report of this interview which omitted the witness' recollection that Demjanjuk was a Treblinka guard.

government engaged in misconduct "by concealing or withholding [evidence] from the district court and this court." *Order*, United States Court of Appeals for the Sixth Circuit, Aug. 17, 1992 (Appendix). However, the nondisclosure of facts in response to discovery requests simply does not constitute fraud on the court. *Gleason v. Jandrucko*, 860 F.2d 556, 559-60 (2d Cir. 1988); *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986); *USM Corp v. SPS Technologies*, Inc., 694 F.2d 505, 509 (7th Cir. 1982); *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 118 (6th Cir. 1976); *Kerwit Medical Products, Inc. v. N&H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980). Moreover, it is not a "fraud on the court" to make objections to discovery and put the opposing party to the burden of obtaining an order to obtain the requested disclosure. *USM Corp.*, 694 F.2d at 509; *Rauenhorst v. United States*, 104 F.R.D. 588, 600 n.18 (D. Minn. 1985); *A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 99 (S.D.N.Y. 1950), *appeal dismissed*, 197 F.2d 498 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952).

Only the most egregious misconduct, such as bribery or an attorney knowingly presenting false evidence to a court will constitute a fraud on the court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944); *Bulloch v. United States*, 763 F.2d at 1121; *Kupferman v. Consol. Research and Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 518 (3d Cir. 1948), *cert. denied*, 335 U.S. 912 (1949); *United States v. International Telephone & Telegraph Corp.*, 349 F. Supp. 22 (D. Conn. 1972), *aff'd*, 410 U.S. 919 (1973); 7 J. Moore & J. D. Lucas, *Moore's Federal Practice*, ¶ 60.33 (1992).

To establish a "fraud on the court" it must be shown that the party was prevented from fully and fairly presenting its defenses as a result of the scheme to defraud. *First National Life Ins. Co. v. Cal. Pacific Life Ins. Co.*, 876 F.2d 877, 883 (11th Cir. 1989); *United States v. Standard Oil Co. of Cal.*, 73 F.R.D. 612, 615-16 (N.D. Cal. 1977). Demjanjuk has failed in this regard for several reasons.

There can be no fraudulent concealment if it reasonably appears that the information could have been obtained by a more diligent use of available discovery and discovery procedures, further investigation of the discovered facts, or where the complaining party had similar access to the information. *See Rauenhorst v. United States*, 104 F.R.D. 588, 599 (D. Minn. 1985) (no fraud on the court where adversary was provided with a list of names of witnesses but did not pursue their statements or depositions); *In Re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987); *Bulloch v. United States*, 763 F.2d 1115, 1118 (10th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986); *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 509 (7th Cir. 1982), *cert. denied*, 462 U.S. 1107 (1983); *Cresswell v. Sullivan & Cromwell*, 771 F. Supp. 580, 586 (S.D.N.Y. 1991), *aff'd without opinion*, 962 F.2d 2 (2d Cir. 1992), *cert. denied*, 112 S.Ct. 3036 (1992); *Nowling v. Aero Services Int'l, Inc.*, 734 F. Supp. 733, 740 (E.D. La. 1990); *A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 99 (S.D.N.Y. 1950), *appeal dismissed*, 197 F.2d 498 (2d Cir. 1952), *cert. denied*, 344 U.S. 878 (1952). *Cf. United States v. Kowalchuk*, 773 F.2d 488, 497-98 (3d Cir. 1985) (no due process violation where defendant did not follow up on opportunity to request interviews of witnesses in Soviet Union even though he had their names), *cert. denied*, 475 U.S. 1012 (1986).[14/]

In this case, the record demonstrates that the government responded properly in discovery. Demjanjuk's failure to obtain whatever evidence the government had at the time -- which was far less than what is now available -- is due to his own lack of interest in

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[14/] This same result has been reached in the criminal context. In this context, the courts have held that there was no violation of *Brady v. Maryland* 373 U.S. 83 (1963) where the prosecutor had given the defendant's attorney the names of material witnesses and the defendant chose not to obtain their statements or call them as witnesses before trial. *United States v. McMillian*, 535 F.2d 1035, 1037-38 (8th Cir. 1976), *cert. denied*, 434 U.S. 1074 (1978); *United States v. Gholston*, 437 F.2d 260, 263 (6th Cir. 1971); *People v. Velez*, 462 N.E.2d 746, 752 (Ill. App. Ct. 1984).

obtaining Soviet witness statements, not to any concealment.[15] Demjanjuk failed to make the reasonable inquiry which would have led to the discovery of the information regarding the "Marchenko" issue. In discovery, Demjanjuk was informed that the Soviets had conducted interviews regarding Demjanjuk and that the Government had received reports of those interviews. (*See* Motion to Extend Time for Discovery and Affidavit, served March 20, 1980). More specifically, the government disclosed in interrogatory answers that Nikolai Malagon had failed to identify Demjanjuk's photograph.[16] (*See* Government's Second Supplemental Answers to Defendant's Fourth Set of Interrogatories, served Sept. 5, 1980). Importantly, Malagon was the only living witness known to the government who had even mentioned the name "Marchenko" (other than, of course, Demjanjuk himself who had repeatedly stated in his immigration and naturalization papers that "Marchenko" was his mother's maiden name). However, Demjanjuk never used the discovery process further to inquire about what information Malagon had provided. Interestingly, neither did he request production of the Soviet witness statements. Instead, *as a matter of trial tactics and strategy*, Demjanjuk only requested production of statements for Soviet witnesses who were going to testify at trial. (*See* Defendant's Fourth Set of Interrogatories Propounded to Plaintiff, served April 14, 1980). If, pursuant to the Federal Rules, he had pursued the production of all Soviet witness statements, he would have obtained the two statements in the government's possession which mentioned the name "Marchenko." Given his own representation that "Marchenko" was

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[15] At the time, all the government had was an excerpt from a statement taken in 1944 referring to a "Nikolai and Marchenko," and a more contemporaneous statement by a Nikolai Malagon that there was a "Nikolai Marchenko" at the gas chambers.

[16] Malagon had recalled that an Ivan "Demjanjuk" or "Demjadjuk" was a guard who served at the gas chambers at Treblinka. In this proceeding before the special master, Demjanjuk's counsel have admitted that Demjanjuk's representatives interviewed Malagon in 1991, but destroyed the tape recording of the interview several days later.

his mother's maiden name, that no doubt would have been a useless discovery. Nevertheless, the primary reason for nondisclosure of information relating to Marchenko is best attributed to Demjanjuk's own failure to pursue information made available in discovery or to pursue necessary discovery under the Federal Rules.[17/]

Furthermore, Demjanjuk cannot show that the alleged misconduct prevented him from asserting a meritorious defense which might have altered the result. *Teamsters v. Superline Transp. Co.*, 953 F.2d 17, 20 (1st Cir. 1992); *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1121 (6th Cir. 1976); *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973); *Assman v. Fleming*, 159 F.2d 332, 336 (8th Cir. 1947); *c.f. United States v. Palciauskas*, 734 F.2d 625, 627 (11th Cir. 1984) (defendant in denaturalization proceeding was not denied a fair trial because of government's alleged obstruction of discovery efforts where allegedly withheld information would not have changed results in denaturalization proceeding).[18/]

Here, Demjanjuk cannot show that the disputed information regarding Marchenko would have altered the outcome of the extradition or denaturalization proceedings. As noted above, the "Marchenko" information created troubling proof *against* Demjanjuk because of his representations that "Marchenko" was his mother's maiden name.

17/ In 1982, Demjanjuk received from the Government a copy of the Polish Main Commission article which lists an "Ivan Marczenko" as a guard at Treblinka. It is important to note that Demjanjuk never made use of this information as well.

18/ This same result has also been obtained in the criminal context under the harmless error rule. The Supreme Court has stated that there is no constitutional violation for failure to disclose exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963) if the information would not have changed the result. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Moreover, if Demjanjuk had further pursued the information -- as he now claims he would have -- and attempted to use it in the extradition proceeding, it could not have altered the outcome. The evidence which Demjanjuk now claims was withheld would have only served to contradict the government's evidence and, therefore, would not have been admissible.[19] In addition, the evidence would not have been admissible because it constituted hearsay. *See, e.g., United States v. Magana-Olvera*, 917 F.2d 401, 408 (9th Cir. 1990); *United States v. Albert*, 773 F.2d 386, 390 (1st Cir. 1985). In fact, the statutory provisions governing extradition proceedings do not permit a defendant to introduce any evidence in affidavit or deposition form. 18 U.S.C. § 3190; *In re Luis Oteiza y Cortes*, 136 U.S. 330 (1890); *First Nat'l City Bank of New York v. Aristeguieta*, 287 F.2d 219, 222 (2d Cir. 1960); *United States v. Taitz*, 134 F.R.D. 288, 290 (S.D. Cal. 1991).

Neither would the information have altered the outcome of the denaturalization proceeding. The district court held that Demjanjuk's

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[19] In extradition, a district court is limited to determining whether there is "probable cause" to justify apprehension and commitment for trial. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Charlton v. Kelly*, 229 U.S. 447, 456 (1913); *Shapiro v. Ferrandina*, 478 F.2d 894, 900-901 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). Importantly, the accused is *not* entitled to present evidence in the extradition proceeding which tends to contradict the government's evidence. *Collins v. Loisel*, 259 U.S. 309, 316 (1922); *Charlton v. Kelly*, 229 U.S. 447, 456 (1913); *Eain v. Wilkes*, 641 F.2d 504, 511 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); *In Re Wadge*, 15 F. 864, 866 (D.N.Y. 1883), *aff'd*, 16 F. 332 (C.C.N.Y. 1883). Probable cause for identification may be established by a single photo identification. *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986), *cert. denied*, 479 U.S. 882 (1986); *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980), *cert. denied*, 449 U.S. 1036 (1980). The accused is not permitted to present evidence as to the suggestiveness of an identification. *In Re Extradition of Singh*, 123 F.R.D. 108, 118 (D.N.J. 1987). To do otherwise would be to convert the proceeding into a full-scale trial which it should not be. *Collins v. Loisel*, 259 U.S. 309, 316 (1922); *Charlton v. Kelly*, 229 U.S. 447, 456 (1913).

citizenship should be revoked for two independent reasons. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1380-83 (N.D. Ohio 1981). First, the evidence showed that he was trained as an SS guard at the Trawniki camp. 518 F. Supp. at 1365-69. That evidence is still unchallenged. Second, the evidence showed that he was at Treblinka. 518 F. Supp. at 1369-76.

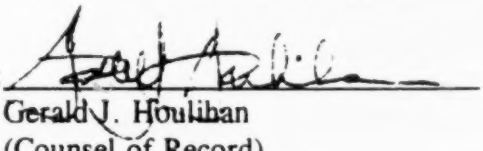
The district court held that Demjanjuk's failure to disclose his service at either camp would have made him ineligible for a visa and therefore constituted a material misrepresentation which justified revocation of his citizenship. 518 F.Supp at 1381-82. Accordingly, any evidence that he was not at Treblinka would not have altered the outcome of the proceeding. Demjanjuk's citizenship would have been revoked anyway on the ground that he was an SS guard at Trawniki. *See Fedorenko v. United States*, 449 U.S. 490 (1981); *United States v. Linnas*, 685 F.2d 424 (2d Cir.), *cert. denied*, 459 U.S. 892 (1982). However, there is even more evidence. As the district court stated, given those alternative holdings, it did not need to reach the issue of his service at the Sobibor death camp. 518 F. Supp. at 1376 n.31. Demjanjuk's SS identity card showed, in fact, that he was at Sobibor. In addition, the newly discovered documentary evidence further establishes that he served at Sobibor. Consequently, any finding regarding Sobibor would be a further ground requiring denaturalization.

CONCLUSION

For all the foregoing reasons, Petitioner prays that this Court:

1. Issue a writ of mandamus or prohibition directed to the United States Court of Appeals for the Sixth Circuit, the Honorable Chief Judge Gilbert S. Merritt, the Honorable Circuit Judge Damon J. Keith, and the Honorable Senior Circuit Judge Pierce Lively, directing them to cease all further proceedings in the action, *Demjanjuk v. Petrovsky*, Sixth Circuit Case No. 85-3435;

2. Enter such other relief as is necessary and appropriate in the circumstances.

By: 

Gerald J. Houlihan
(Counsel of Record)
David T. Azrin
GREENBERG, TRAURIG,
HOFFMAN, LIPOFF, ROSEN
& QUENTEL, P.A.,
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Attorneys for Petitioner

United States Court of Appeals
For the Sixth Circuit

Leonard Green
Clerk

December 15, 1992

Gerald J. Houlihan, Esq.
Greenberg, Traurig, Hoffman, Lipoff,
Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131

Re: No. 85-3435
Demjanjuk v. Petrovsky

Dear Mr. Houlihan:

Thank you for your letter of inquiry of December 10, 1992 in the above-captioned case.

The order of December 2,1992 misspoke in referring to Mr. Moscowitz' request as one for "rehearing" en banc, rather than for an en banc hearing in the first instance. I am advised by the court that in addition to its declination to hear the motion to quash en banc, it was the intent of the panel to deny the motion to quash itself.

Trusting that this gives you the clarification you seek, I am

Very truly yours,

/s/
Leonard Green, Clerk

LG:m

No. 85-3435
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
JOSEPH PETROVSKY, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	
	)	

BEFORE: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestions for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and conclude that the issues raised in the petitions were fully considered. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

FILED
DEC 02 1992
LEONARD GREEN, CLERK

No. 85-3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK Petitioner-Appellant, v. JOSEPH PETROVSKY, et al., Respondents-Appellees.	)	**ORDER**

BEFORE: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

In its order of August 17, 1992, this Court appointed the Honorable Thomas A. Wiseman, Jr., District Judge for the Middle District of Tennessee, to act as its Special Master in conducting an evidentiary hearing on the issue of whether Department of Justice attorneys engaged in prosecutorial misconduct by concealing or improperly withholding evidence in undertaking denaturalization, deportation and extradition actions against the petitioner. In that Order we stated that counsel for the respondents "conceded that 'mistakes were made.'" The respondents have moved this Court to correct that Order by revising the quoted phrase. Respondents contend that the quotation mischaracterizes their position.

Counsel for the respondents made several admissions or concessions at oral argument. For example, respondents acknowledge that counsel "admitted that the failure to include Sol Lackman's name in the list of persons who failed to identify Demjanjuk's photograph

was a 'mistake.'" Respondents' Motion to Correct Order at 2. Counsel also conceded that it would have been "prudent" for the Justice Department or its Office of Special Investigations to have released the Leleko and Malagon statements obtained from 1977 Soviet protocols. These statements identified Ivan *Marchenko* as an operator of the Treblinka gas chambers. Though counsel for respondents might not have used the phrase "mistakes were made" in the precise context in which we used it in our Order, the phrase reflects our understanding and interpretation of the arguments and concessions made at oral argument by respondents.

We therefore reaffirm our Order of August 17, 1992. That Order, however, is not intended to preclude respondents from having the opportunity to argue the meaning, significance or correct interpretations of any statements made in their briefs or during oral argument at a later date.

Accordingly, the respondents' motion to correct the Order is DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

FILED
AUG 31 1992
LEONARD GREEN, CLERK

No. 85-3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
JOSEPH PETROVSKY, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	
	)	
	)	

Before: MERRITT, Chief Judge, KEITH, Circuit Judge, and LIVELY, Senior Circuit Judge.

Pursuant to orders of this court entered on June 5, 1992, and June 18, 1992, counsel for the parties appeared for oral argument after having previously filed briefs and appendixes. At the commencement of oral argument the panel, speaking through Chief Judge Merritt, stated that the essential issue joined by the parties in their briefs is whether this court mistakenly affirmed the district court's denial of John Demjanjuk's habeas corpus petition. *See Demjanjuk v. Petrovsky* 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). The Chief Judge then stated that the court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as "Ivan the Terrible" who operated the gas chambers at the Treblinka, Poland Nazi death camp. The "bedrock question" for the court, Judge Merritt continued, is whether the failure of the attorneys to

disclose such exculpatory information constituted fraud upon the court that misled this court into allowing Demjanjuk to be extradited.

The case was ably and extensively argued by counsel and, at the conclusion of oral argument, was taken under submission by the court. Upon consideration the court concludes that further proceedings are required as set forth herein.

I.

Before outlining the additional proceedings, we dispose of the Department of Justice's contention that this court lacks jurisdiction to conduct the present inquiry. The Department argues that we have no power to review our 1985 judgment, particularly in view of the fact that Demjanjuk is now in Israel, having been convicted by an Israeli court for violation of Israeli law. We disagree. This court is proceeding under its inherent power to grant relief, for "after-discovered fraud," from an earlier judgment "regardless of the term of [its] entry." *Hazel-Atlas Glass Co. v.l Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). Furthermore, nothing requires this court to follow the "cumbersome and dilatory procedure" of sending this issue back to the district court for decision. *Id.* at 249.

The fact that a federal court has the inherent power "to vacate its own judgment upon proof that a fraud has been perpetrated upon the court" was reaffirmed by the Supreme Court at its 1990 term. See *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2132 (1991). The Court warned that, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Id.* Mindful of this admonition, we have determined to make every effort to be certain that we have as complete a record as possible before acting upon the serious charges made by the petitioner in this case.

II.

Counsel for the Department of Justice conceded that "mistakes were made." This admission was based upon the undisputed fact that

the Department had in its possession prior to the extradition proceedings statements and documents indicating that John Demjanjuk was not "Ivan the Terrible," but that another Ukrainian guard at Treblinka, Ivan Marchenko, was the operator of the gas chambers whom the prisoners referred to by this sobriquet.

It is alleged by the petitioner that this information was known to attorneys within the Department of Justice who were involved in the Demjanjuk denaturalization, deportation and extradition proceedings, but that none of the information was produced to Demjanjuk's counsel in response to numerous interrogatories and requests, or revealed to the court. The attorneys so identified at this time are Allan Ryan, Norman Moscovitz [sic], George Parker and John Horrigan. The first three worked within the Department in its Office of Special Investigations (or its predecessor), while Horrigan served as an assistant United States Attorney for the Northern District of Ohio. All four attorneys were involved in the proceedings against John Demjanjuk.

III.

In order to procure information that we deem essential for reaching a decision on the issue before us, the court hereby appoints the Honorable Thomas A. Wiseman, Jr., Judge of the United States District Court for the Middle District of Tennessee, as Special Master of this Court pursuant to Fed.R.Civ.P. 53(c). This reference requires the Master to take the testimony of attorneys Ryan, Moscovitz [sic], Parker, and Horrigan, if available, and to receive such other evidence as he may determine to be relevant and material to the issue under submission. The Master shall have all of the powers granted to such officers under Fed.R.Civ.P. 53(c). After completing his duties pursuant to this order of reference, the Master will prepare a report on the matters covered by this order. He will file the report with the clerk of this court and serve on each party notice of the filing and a copy of the report together with a transcript of all proceedings and of the evidence and any original exhibits as provided in Fed.R.Civ.P. 53(e)(1).

Entered by order of the court

By: /s/
Clerk

FILED
AUG 17 1992
LEONARD GREEN, CLERK

No. 85-3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK Petitioner-Appellant, v. JOSEPH PETROVSKY, et al., Respondents-Appellees.	)	**ORDER**

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

The petitioner-appellant, John Demjanjuk, was extradited to the State of Israel for trial of a capital offense, the commission of war crimes during World War II. In a previous decision of this court in this case, 776 F.2d 571 (6th Cir. 1985), we declined to stop the extradition by issuing a writ of habeas corpus. Our previous study of the record and numerous recent press reports and articles in the United States indicate that the extradition warrant by the Executive Branch may have been improvidently issued because it was based on erroneous information. Consideration should be given to its validity and to whether this court's refusal to grant the petition for writ of habeas corpus was erroneous.

In our previous decision we said that the extradition should be limited:

> The district court clearly certified that Demjanjuk was subject to extradition solely on the charge of murder. Though some of the acts which Demjanjuk is charged with may also constitute other offenses listed in the treaty, he may be tried in Israel only on that charge.

776 F.2d at 583.

Pursuant to the authority stated in Rule 40, Fed.R.App.Proc., pertaining to the rehearing of causes previously heard and Rule 60(b)(5), Fed.R.Civ.P., pertaining to relief from judgments previously entered, the Court, upon its own motion, makes the following orders with respect to the prior proceedings concerning the extradition warrant heretofore issued in this case under Chapter 209, Title 18 (§§ 3181-3195), United States Code:

1. The United States, on or before July 15, 1992, shall file with the Court a brief describing any items of evidence of any kind, of which it has knowledge, tending to show that the petitioner-appellant, Demjanjuk, is not the "Ivan the Terrible" who committed war crimes at the Treblinka death camp, in particular murder, as described in 776 F.2d 571 (6th Cir. 1985), together with a statement of approximately when agents of the United States first learned of each such item of evidence.

2. On or before July 25, 1992, the petitioner-appellant shall file a brief describing affidavits, depositions or other statements of witnesses in his possession (which are not described in the government's brief referred to in paragraph 1 above), which tend to show that a man known as Ivan Marchenko was the "Ivan the Terrible" referred to in paragraph 1.

3. On or before August 1, 1992, the parties should file simultaneous briefs stating their respective position on the question whether the Court should reconsider its earlier decision concerning the issuance of a writ of habeas corpus in this case, including the

question whether the court should remand the case to the district court for a further evidentiary hearing respecting the case.

4. The Federal Public Defender for the Northern District of Ohio is hereby appointed to represent the defendant, provided the petitioner-appellant or the members of his immediate family in the United States do not object to such appointment, and provided further that he is qualified for such representation under 18 U.S.C. § 3006A.

5. An oral hearing on this matter is set for Tuesday afternoon, August 11, 1992, at 2:30 P.M.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

FILED
JUN 05 1992
LEONARD GREEN, CLERK

No. 85-3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
JOSEPH PETROVSKY, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	
	)	
	)	

Before: MERRITT, Chief Judge

For good cause shown, this matter is restored to the Court's docket and assigned, pursuant to Rule 3, Rules of the Sixth Circuit, to a panel consisting of Merritt, Chief judge; Keith, Circuit Judge; and Lively, Senior Circuit Judge, for further proceedings.

This 3rd day of June, 1992.

/s/
Gilbert S. Merritt, Chief Judge

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Supreme Court, U.S.
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NO. 92-1447

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IN RE NORMAN A. MOSCOWITZ,
Petitioner,
v.

GILBERT S. MERRITT,
CHIEF JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAMON J. KEITH,
CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND

PIERCE LIVELY,
SENIOR CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT,
Respondents.

BRIEF IN OPPOSITION TO NORMAN A. MOSCOWITZ'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

Michael E. Tigar
727 E. 26th Street
Austin, Texas 78705
(512) 471-6319
(Counsel of Record)

Edward F. Marek
Office of the Federal Defender
Skylight Office Tower
Suite 750
1660 West 2nd Street
Cleveland, Ohio 44113-1454
(216) 522-4856

Attorneys for John Demjanjuk
Respondent

April 1, 1993

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Statement of the Case

John Demjanjuk was extradited to Israel on February 27, 1987. He was convicted there in 1988 for crimes committed by "Ivan the Terrible", the ruthless Nazi guard of the Treblinka gas chambers during World War II. The Israeli Court sentenced Mr. Demjanjuk to death; he is currently in Israel in solitary confinement under 24-hour surveillance awaiting a final determination by the Israeli Supreme Court.

In 1985, the United States Court of Appeals for the Sixth Circuit had upheld the extradition of Mr. Demjanjuk by declining to issue a writ of habeas corpus to stop the process. 776 F.2d 571 (6th Cir. 1985). On June 5, 1992, the Sixth Circuit, sua sponte, issued an order beginning an inquiry to determine whether Demjanjuk's extradition may have been based on erroneous information. The June 5 order asked, inter alia, for a brief from the United States describing all information in the government's possession tending to show Demjanjuk was not "Ivan the Terrible." A second order issued on June 18 asked the parties to brief relevant international law issues, "in light of possible new evidence that Demjanjuk is not 'Ivan the Terrible'."

On August 17, after briefing and oral argument pursuant to the orders of June 5 and June 18, the Sixth Circuit panel issued a third order. The order of August 17 recounted the motivation for the court's reopening of the case:

> [T]he court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as "Ivan the Terrible" who

> operated the gas chambers at the Treblinka, Poland death camp. The "bedrock question" for the court ... is whether the failure of the attorneys to disclose such exculpatory information constituted fraud upon the court that mislead this court into allowing Demjanjuk to be extradited.

In order to procure information the Sixth Circuit panel deemed "essential" for reaching a decision on the issue of fraud, the court appointed Judge Thomas Wiseman of the Middle District of Tennessee as Special Master to conduct hearings and report back to the Sixth Circuit.

As the Sixth Circuit's Order required, Petitioner Norman Moscowitz was called as a witness in the Special Master proceedings; he took the stand before Judge Wiseman January 14-15, 1993. His testimony is a matter of public record. Petitioner Moscowitz was one of the lead attorneys during the initial Demjanjuk denaturalization investigation at the Justice Department's Office of Special Investigations (OSI)--the Nazi hunting office of the Department.

Having testified before the Special Master, petitioner Moscowitz now asks this Court for a writ of mandamus or prohibition to stop the hearings ordered by the Sixth Circuit.

Summary of Argument

Norman Moscowitz lacks the standing necessary to petition this Court for an extraordinary writ. A basic requirement of standing is that the party claiming standing must be aggrieved by a prospective judgment. Petitioner Moscowitz is--by his own admission--not a party to this dispute; he is a nonparty witness. A judgment against the government will have no adverse legal

impact for Petitioner Moscowitz. It is only in the most unusual circumstances that a nonparty witness may make procedural challenges to a proceeding. Having declined to suffer a contempt citation in order to challenge the jurisdiction of the Special Master, Moscowitz now lacks standing to challenge the Sixth Circuit's procedures.

The use of the extraordinary writ of mandamus would be inappropriate in this case. Mandamus should not issue where there is another adequate remedy available. If petitioner Moscowitz has the standing he claims (but which respondent does not concede) then the avenue of appeal is available after an adverse judgement by the Sixth Circuit. Moreover, mandamus may not be used to challenge a Court's actions in the exercise of its proper jurisdiction. Only when a court has refused to act, or has acted completely outside of its jurisdiction may a superior court issue a writ of mandamus. In this instance, the Sixth Circuit has acted. An investigation of fraud on the court is clearly within the Sixth Circuit's jurisdiction. Thus, mandamus is inappropriate. The writ may not be used to dictate the manner of a judge's action. The case of La Buy v. Howes Leather Co., 352 U.S. 249 (1957) is inapposite. The inquiry by the Special Master in this instance is justified by exceptional circumstances, is conducted by a sitting federal judge and is not a trial. These facts distinguish the current case from La Buy.

This case is moot with regard to petitioner Moscowitz. Petitioner Moscowitz has testified under oath in open court. Moscowitz asserts that he may suffer reputational injury from a

finding by the Sixth Circuit, based in part on his testimony. Having testified, Moscowitz may not now complain of the process by which his testimony was procured. Speculative reputational harm or professional injury are not adequate to make ripe for decision an otherwise moot case.

Finally, the equities of this case militate against the issuance of an extraordinary writ to stop the Special Master proceeding. Mandamus is governed by equitable principles. The Sixth Circuit is attempting to determine whether Justice Department attorneys conducted a fraud on the court in order to procure the extradition of John Demjanjuk. One of the attorneys testifying to the events of that extradition now asks that the hearing be suspended and delayed to protect his reputation, while the subject of the extradition itself remains under a death penalty in Israel. Mandamus should be withheld where the equities do not favor the issuance of the writ.

Argument

I. Petitioner Moscowitz lacks standing to challenge the jurisdiction and procedures of the Sixth Circuit in its investigation of fraud on the court.

Norman Moscowitz has petitioned the Court for a writ of prohibition or mandamus to halt the Sixth Circuit's Special Master proceeding alleging that he has a "personal stake" in a finding of prosecutorial misconduct. Petition at 3. By his own admission, Moscowitz is not a party to the ongoing dispute between John Demjanjuk and the United States Government. Petition at 2. His only role is as a witness called to testify

about the procedures in the Office of Special Investigations and his own actions during the denaturalization proceedings against John Demjanjuk over a decade ago. As a nonparty witness, who does not meet the essential standing requirements of particularized injury, causation and redressability, Moscowitz has no standing to challenge the Sixth Circuit's proceedings.

a. Petitioner lacks the basic requirements of standing.

At an irreducible minimum, Article III requires that the party who invokes the court's authority show that he personally has suffered a particularized actual or threatened injury as the result of the putatively illegal conduct of the defendant, and that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision. Bender v. Williamsport Area School Dist., 475 U.S. 534, 542 (1986); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976). Petitioner cannot show that the conduct of the Sixth Circuit threatens him with an injury adequate to confer standing. Petitioner's claimed injury is speculative, unrelated to the challenged action, and would not be redressed by a favorable decision.

Petitioner's claimed injury is too speculative to support standing. At core, Petitioner claims that the Sixth Circuit's investigation would harm his reputation and possibly lead other bodies to institute disciplinary sanctions against him. Petition at 5. While in some circumstances a stigmatizing injury might be sufficient to support standing, Wright v. Allen, 104 S.Ct. 3315, 3328 n.22 (1984), because Petitioner presents nothing beyond a

bare assertion to support his claim of reputational injury, Petitioner's claim of injury is insufficient. Block v. Meese, 793 F.2d 1303, 1308 (D.C. Cir.), cert. denied 478 U.S. 1021 (1986). Similarly, Petitioner's concern about future disciplinary proceedings is too speculative to confer standing, because he makes no showing that such proceedings will likely be initiated. Moreover, had such a showing been made, Petitioner's rights would be adequately protected in any state disciplinary proceeding against him. See Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).[1]

In addition, Petitioner's claimed injury cannot be traced to the Sixth Circuit's fraud on the court investigation. The crux of the dispute in this case is whether judicial approval under 18 U.S.C. § 3184 for Mr. Demjanjuk's extradition to Israel was improperly procured by the Justice Department. The Sixth Circuit's order appointing the Special Master explicitly indicates that the "bedrock question" before the Sixth Circuit "is whether the failure of the [Department of Justice] attorneys to disclose...exculpatory information constituted fraud upon the court that misled this court into allowing Demjanjuk to be extradited." Order of Aug. 17, at 3. The purpose of the Sixth Circuit inquiry, and the focus of the fact finding delegated to the Special Master, is to discern whether there was fraud on the court necessitating vacatur of Demjanjuk's extradition. Id.; see also Chambers v. NASCO, 111 S.Ct. 2123, 2132 (1991). Thus,

[1] To see the extent of the protections that the Sixth Circuit has erected in its disciplinary proceedings, see Petition at 21 n.12.

contrary to Petitioner's assertion, the purpose of the investigation is not to sanction or to impugn the particular government attorneys who worked on or supervised the Demjanjuk denaturalization, deportation, and extradition proceedings. This Court should not confer standing for appeal on the losing counsel in every action where a court dismissed or vacated a judgment, regardless of its ancillary effect on an attorney's reputation.

Finally, Petitioner's claimed injury would not be redressed by a decision in his favor. Petitioner criticizes the procedures by which the Sixth Circuit is conducting its investigation. Petition at 21. However, following Petitioner's suggestion--that "the matter be[] properly remanded to the district court,"--would nonetheless require Petitioner to testify as to his conduct, the very requirement in which Petitioner finds his injury.

b. Petitioner is not a de facto party.

Petitioner wisely concedes that, in general, "one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." Karcher v. May, 484 U.S. 72, 77 (1987). Petitioner nonetheless suggests that he is a de facto party. This Court should reject Petitioner's suggestion.

The doctrine of de facto parties allows appeals to persons who were required to participate in trial court proceedings much as if they had intervened. See, e.g., Martin-Trigona v. Shiff, 702 F.2d 380, 385 (2d Cir. 1983); see also 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3902.1 (1992). Petitioner would stretch this doctrine beyond usefulness. His assertions that he has been ordered "to

participate in the proceedings" and that he was "specifically named" in the Sixth Circuit's order appointing a Special Master, Petition at 4, do not bring him into the fold of the de facto party doctrine, but rather confirm his status as a witness. The Sixth Circuit listed Petitioner's name among the four lawyers whose involvement in Mr. Demjanjuk's proceedings would make them particularly knowledgeable witnesses. Petition at A-7. The "participation" that the Sixth Circuit ordered of Petitioner was not as a party but rather as a witness.

By contrast, the de facto parties recognized in Martin-Trigona, which the Petitioner cites as authority for his own status, participated in the underlying proceedings much as parties. Martin-Trigona involved trustees of a bankruptcy estate who sought to appeal a habeas corpus judgment that released the bankrupt from civil contempt ordered when the bankrupt refused to answer questions relating to the estate. In that case, "[a]lthough the trustees were not named parties in the district court, they did participate in those proceedings. In fact, the district court ordered both trustees, 'being the real parities [sic] in interest,' to respond to [the petitioner's] application for...relief." Id. at 385. In light of their involvement, the court allowed them to bring their appeal of the habeas action. Petitioner's involvement in this case as a witness is not commensurately significant nor insisted upon.

Finally, one cannot use the de facto party doctrine to circumvent the constitutional requirement of standing. In the absence of standing, Petitioner cannot cling to his self-

perceived status as a de facto party to allow him to bring this appeal.

c. A nonparty witness has limited rights of appeal.

Witnesses are essential to the fair and full adjudication of legal issues. "Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law. Lord Chancellor Hardwicke's pithy phrase cannot be too often recalled: '[T]he public has a right to every man's evidence.'" Piemonte v. United States, 367 U.S. 558, 559 n.2 (1961); see also United States v. Sciarra, 851 F.2d 621, 636 (3d Cir. 1988) (observing that the nonparty witnesses in the case before it "have done nothing more than their public duty, inconvenient as it may have been, to provide unprivileged information requested by their government."). Petitioner Moscowitz is a witness in the Sixth Circuit's investigation of fraud on the court, and was so designated by the Court's order of August 17, 1992, appointing a Special Master to conduct hearings.

A finding that Petitioner Moscowitz has standing to make a procedural challenge in a court proceeding in which his only role is as a nonparty witness would set a remarkable precedent. This Court has in the past severely constrained the rights of nonparty witnesses to challenge court proceedings. A nonparty witness is not permitted to make objections of incompetency or irrelevancy, "for this is no concern of his." Blair v. United States, 250 U.S. 273, 282 (1919). "[I]t is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not." Id. The Court has limited

nonparty witnesses' rights to a jurisdictional challenge via the appeal of a contempt citation for refusal to testify. United States Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72 (1988). Except in the unique circumstance of a contempt citation, a nonparty witness may not obtain appellate review of a court's order requiring testimony or production of documents. See United States v. Ryan, 402 U.S. 530, 532 (1971)("If... the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him."). In Alexander v. United States, 201 U.S. 117 (1906), the Circuit Court for the Eastern District of Wisconsin had issued orders that a number of witnesses appear before a "special examiner" to answer questions and produce requested documents. The subpoenaed witnesses appeared but refused to answer certain questions or permit the use of certain papers "on the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced." The Circuit Court ordered the witnesses to answer the questions and the nonparties appealed to this Court. This Court held that the only means of review for the nonparty witness was to refuse to testify and then challenge the contempt order:

> [A]n order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as orders under review, but from such a ruling it is not contended there is an appeal. Let the court go further, and punish the witness for contempt of its order, --then arrives the right of review...."

Id. at 121. Petitioner Moscowitz could have challenged the jurisdiction of the Sixth Circuit by refusing to testify and by

being held in contempt. To his credit, in a deliberate tactical decision, Moscowitz did not choose that route. But appeal through contempt remains the only method by which a nonparty witness may challenge the order of a court. Having chosen to testify, Petitioner now lacks standing to ask this Court to issue a writ of mandamus.

II. With regard to Petitioner Moscowitz, this case is moot.

Petitioner Moscowitz alleges that the findings of Special Master Wiseman will "not only cause irreparable harm to his reputation, but could also lead to further disciplinary proceedings against him." Petition at 5. But Mr. Moscowitz has already testified under oath before the Special Master. This testimony was covered in the national press.[2]

Because Mr. Moscowitz has testified and all of the evidence surrounding his involvement with the Demjanjuk case is now a matter of public record on file with the Special Master in Nashville, the petition is moot. "Mootness determinations are concerned in large part with the determination whether any effective purpose can still be served by a specific remedy." 13A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §3533.1 (1984). Had Moscowitz chosen to resist the subpoena compelling him to testify, his complaints about the procedures used by the Sixth Circuit would be ripe. But having

[2] See, e.g., "Ivan" Inquiry Defended, Sun Sentinel (Florida), Jan. 16, 1993, at 3A; Matthew Brelis, Ex-U.S. Official Defends Demjanjuk Prosecution, Boston Globe, Jan. 30, 1993, at 15; Former Nazi Hunter Says "Ivan" is Guilty, San Jose Mercury News, Jan. 15, 1993, at 4A; Paul Levitt, Ivan Hearing, USA Today, Jan. 15, 1993, at 11A; Ex-Nazi Hunter Defends "Ivan" Investigation, Wash. Times, Jan. 16, 1993, at A2.

testified, Moscowitz cannot now complain about the process by which his testimony was procured.

In Office of Thrift Supervision v. Dobbs, 931 F.2d 956 (D.C.Cir. 1991), the OTS had issued a subpoena duces tecum requiring the production of certain documents and an appearance at a deposition. Citing numerous decisions of other courts, the D.C. Circuit dismissed an appeal challenging the subpoena on the ground that Dobbs had already complied and OTS had obtained his testimony. See id. at 957 and cases cited therein. As to Dobbs's complaint that he remained subject to the subpoena and could be called to testify again, the court found that "future speculative action that may never occur is insufficient to create a concrete present controversy." Id. at 958; see also, United States v. Kis, 658 F.2d 526, 532-33 (7th Cir. 1981), cert. denied sub. nom. Salkin v. U.S., 455 U.S. 1018 (1982)(appeal to prevent future use of compelled evidence dismissed as moot because such use would be highly speculative). Injuries that are too speculative do not merit extraordinary relief. Whitehorse v. Ill. Central R. Co., 349 U.S. 366, 373 (1955).

Moscowitz's complaints about the potential for future injury in his professional life on the basis of theoretical disciplinary action by a hypothetical body are also moot, because any such action is highly speculative. Moreover, the testimony on which such an action would be based is part of the public record of

this case. There is no live controversy regarding petitioner Moscowitz and the writ of mandamus should be denied.[3]

III. It would be an improper use of the extraordinary writ of mandamus for this Court to stay the Sixth Circuit's investigation of fraud on the court.

a. If Petitioner has standing to obtain an extraordinary writ, then he also has standing to appeal from an adverse finding, and therefore there exists an adequate remedy at law.

Petitioner Moscowitz may not obtain review of the Sixth Circuit's investigation of fraud on the Court via a mandamus petition.[4] Mandamus is appropriate when appeal is clearly inadequate and the writ is reserved for truly extraordinary causes. These prohibitions are particularly relevant where mandamus is requested against a judge. Ex Parte Fahey, 332 U.S. 258, 259-60 (1947). Petitioner Moscowitz claims that he has no other adequate remedy available to challenge the appointment of the Special Master, bemoaning the United States' reluctance to take immediate action. Petition at 6.[5] But if Petitioner Moscowitz has standing to obtain a writ of mandamus, as he claims, Petition at 2-6, then he would also have standing to

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[3] An apparent acceptable remedy to Mr. Moscowitz -- remand to the district court judge who heard the denaturalization and extradition cases -- would not avoid the type of public inquiry that is now taking place before the Special Master and from which Mr. Moscowitz requests relief.

[4] Petitioner styles his motion a "Petition for a Writ of of Prohibition or Mandamus." The following arguments, although directed toward the writ of mandamus, apply equally to the writ of prohibition. See Robert L. Stern & Eugene Gessman, Supreme Court Practice § 11.2, at 630 (5th ed. 1978) ("[S]ince almost any issue can be phrased either affirmatively or negatively, these writs are often used interchangeably....").

[5] "[T]he Department [of Justice] has elected not to pursue [jurisdiction] objections until after judgment." Petition at 6.

obtain review through appeal after the final determination by the Sixth Circuit.[6]

While Mr. Demjanjuk does not concede that Petitioner Moscowitz has standing to challenge actions by the Sixth Circuit (see Part I, supra), taken on its own terms Petitioner's argument is internally inconsistent. In order to establish the standing necessary to obtain an extraordinary writ, Moscowitz makes reference to cases granting nonparties the right to appeal. If petitioner Moscowitz does have the nonparty standing he claims, then like the government, he may assail the procedures used by the Sixth Circuit after a final decision.

No writ may be granted where there is an adequate remedy through the appellate process. See Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa, 490 U.S. 296, 309 (1989) ("[P]etitioners must show that they lack alternative means to obtain the relief they seek, and carry the burden of showing that their right to issuance of the writ is clear and indisputable.") (citations omitted); Will v. United States, 389 U.S. 90, 96 (1967)(mandamus may never be employed as a substitute for appeal); Marbury v. Madison, 1 Cranch 137, 169 (1803)("Still, to render the mandamus a proper remedy ... the person applying for it must be without any other specific and legal remedy.") Because, if Petitioner Moscowitz has the standing he claims, he

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[6] If injured in a fashion adequate to support standing, Petitioner Parker would be able to intervene after final judgment and seek to appeal the Sixth Circuit's findings. See e.g., United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)(permitting post-judgment intervention by nonparty for purpose of appeal).

would also be able to appeal a final judgment, a mandamus action before final judgment is improper.

b. Petitioner alleges no actions by the Sixth Circuit that justify the issuance of an extraordinary writ of mandamus

Beyond the fact that Petitioner Moscowitz--if he has any standing at all--must wait for a proper appeal, the principles of mandamus do not permit the issuance of a writ under the facts alleged in the petition. The Sixth Circuit has not declined to exercise its jurisdiction; nor does Moscowitz allege that the Court has exceeded its jurisdiction in appointing a Special Master. Rather, petitioner Moscowitz complains in part of a decision made by the Sixth Circuit in the exercise of its jurisdiction. See Petition at 13-16 (arguing that the Sixth Circuit should have remanded the case to the district court as a fact-finder in the fraud on the court investigation); id. at 16-19 (arguing against the procedures adopted by the Sixth Circuit in hearing the fraud on the court case). Petitioner also argues that the Sixth Circuit is without jurisdiction. This claim is too frivolous to justify mandamus.

A writ of mandamus may not be used to challenge a court's actions in the exercise of its proper jurisdiction. An inferior court may only be ordered through mandamus that it must exercise its jurisdiction, or be instructed that it has engaged in a usurpation of power. Mandamus may not be used to order a lower court to re-evaluate an abuse of discretion. Will v. United States, 389 U.S. 90, 104 (1967); See Roche v. Evaporated Milk

Ass'n, 319 U.S. 21, 27 (1943)(refusing to issue writ where an inferior court "acted within its jurisdiction" even though the action taken may have been erroneous); Interstate Commerce Commission v. U.S. ex rel Campbell, 289 U.S. 385, 394 (1933)("If mandamus were to stand...the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is the appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action."); Ex Parte Perry, 102 U.S. 183, 186 (1880)("We cannot by mandamus correct the judicial errors committed by an inferior court in the progress of a cause. We can in this way, in a proper case, compel an inferior court to act, but cannot control its decisions while acting."); Ex Parte Sawyer, 88 U.S. 235, 238 (1874)("A superior court may by mandamus set the machinery of an inferior court in motion, but when that has been done, its power under that form of proceeding is at an end. The inferior court is supreme within its own jurisdiction, so long as it is acting."); Ex Parte Newman, 81 U.S. 152, 165 (1871)("[T]he only office of the writ [of mandamus] when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.").

There is no valid argument that the Sixth Circuit's appointment of a Special Master constituted the "usurpation of power" necessary to justify mandamus. See Gulfstream Aerospace v. Mayacamas Corp., 485 U.S. 271, 289 (1988). To the extent that Petitioner Moscowitz complains only that the Sixth Circuit decided to engage in fact-finding by delegating the task of taking evidence during an inquiry into fraud on the court to one federal judge rather than another, writ of mandamus is an inappropriate vehicle for relief. On the other hand, to the extent that Petitioner Moscowitz complains that the Sixth Circuit has acted beyond its jurisdiction, Petition at 10-13, the Petitioner is clearly in error.

The the Sixth Circuit's appointment of a Special Master is a wholly proper exercise of discretion, unreviewable by mandamus. Petitioner Moscowitz relies on La Buy v. Howes Leather Co., 352 U.S. 249 (1957), a case where this Court affirmed the issuance of a writ of mandamus ordering a district judge to vacate a reference order to a non-judge special master under F.R.C.P. 53. La Buy was a hotly debated 5-4 opinion which is distinguishable on its facts and by subsequent decisions of the Court. In La Buy, the district judge had referred entire civil antitrust trials to a master on the basis that the district judge feared full trial proceedings would take too long, clogging his busy docket. In affirming the Circuit Court's mandamus order, this Court was concerned that the litigants had been denied their right to a trial by an article III judge for no "exceptional"

reason. La Buy, 325 U.S. at 258.[7] The Circuit court that had issued the mandamus order was aware of the district judge's propensity to abuse the special master process.

That there was no intent in the La Buy decision to permit interlocutory review via mandamus of all discretionary applications of the federal rules was subsequently made clear in Will v. United States, 389 U.S. 90, 96 (1967). In Will, this Court described La Buy as a case where the judge had displayed "a persistent disregard for the federal rules." Will, 389 U.S. at 104 n.14. Finding no pattern of "deliberate disregard for the federal rules" in the record in Will, the Court declined to issue the requested writ:

> In La Buy, however, we specifically relied upon evidence in the record which showed a pattern of improper references of cases to special masters by the District Judge. There is no evidence in this record concerning petitioner's practice in other cases, aside from his own remark that the government is generally dissatisfied with it, and his statements do not reveal any intent to evade or disregard the rules.

Id. at 104-05. No such allegation has been made in Moscowitz's petition. While the instant case involves the same rule

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[7] Apparently the reference of cases to non-judge lawyers was of particular concern to the La Buy majority as it cited in a footnote a passage from a then current casebook on Judicial Administration:

> There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as a referee. Only a drastic administrative rule...will put to rout this inveterate enemy of dispatch in the trial of cases.

La Buy, 352 U.S. at 253 n.5 (citation omitted).

(F.R.C.P. 53) as La Buy, Moscowitz's petition is best analogized to the situation found in Will:

> Thus, the most that can be claimed on this record is that petitioner may have erred in ruling on matters within his discretion. See Parr v. United States, 351 U.S. 513, 520 (1956). But "[t]he extraordinary writs do not reach such cases; they may not be used to thwart the congressional policy against piecemeal appeals." Id., at 520-521. Mandamus, it must be remembered, does not run the gauntlet of reversible errors." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953). Its office is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power. Id. at 383. Thus, the record before us simply fails to demonstrate the necessity for the drastic remedy employed.

Will, 389 U.S. at 103-04 (parallel citations omitted).

Beyond the lack of a "pattern of disregard" for the rules, other facts distinguish La Buy from the instant case. La Buy involved the reference of an entire trial to a master. The master in La Buy was not an article III Judge. Other courts have agreed that a reference of an entire trial, or reference to a non-judge master is a clear abuse of discretion, to be cured through mandamus under La Buy. See e.g., In re Bituminous Coal Operators' Ass'n, inc., 949 F.2d 1165, 1169 (D.C. Cir. 1991)(special master may not be appointed as a "surrogate judge" to try the controversy and determine liability); In re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985)(district court erred in granting the master authority to preside at trial on the merits but reference for other purposes held proper); In re Watkins, 271 F.2d 771, 775 (5th Cir. 1959)(mandamus appropriate where reference to master "nullifies the right to an effective trial

before a constitutional court"). Thus, to the extent that mandamus is used to guarantee a party the right to trial before a constitutionally appropriate fact-finder, La Buy is in keeping with Supreme Court precedent. See Thermatron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)(mandamus appropriate to correct a clearly erroneous remand of case out of a federal forum); Dairy Queen v. Wood, 369 U.S. 469, 472 (1962)(mandamus appropriate to protect constitutional right to trial by jury); Beacon Theatres, Inc v. Westover, 359 U.S. 500 (1959)(same). The Sixth Circuit referred the fact-finding duties in this case to a sitting federal Judge--Judge Wiseman of the Middle District of Tennessee. Judge Wiseman is anything but the "temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work" that the supreme Court had warned against as a fact-finder in La Buy. La Buy, 325 U.S. at 259. Moreover, the investigation taking place in Nashville is not a trial. It is an inquiry into prosecutorial misconduct during proceedings long past. Therefore, La Buy is inapplicable on its facts.

Moreover, to the extent that La Buy was a decision generally granting superior courts "supervisory control" over inferior courts though the use of mandamus, it is dubious precedent. In this regard, "La Buy is defunct. Although the Court has not yet erected the tombstone, it has ordered flowers." First National Bank of Waukesha v. Warren, 796 F.2d 999 (7th Cir. 1986)(opinion of J. Easterbrook). See also, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 n.7 (1978)("Although in at least one instance we

approved the issuance of the writ upon a mere showing of an abuse of discretion, La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957), we warned soon thereafter against the dangers of such a practice.")(plurality opinion)(citing Will v. United States). Because the Sixth Circuit's action does not fit the requirements for a writ of mandamus under La Buy, and because the Sixth Circuit was exercising its sound discretion by appointing one federal judge rather than another to investigate fraud on the Sixth Circuit court, no writ of mandamus should issue in this case.

Finally, to the extent that Petitioner Moscowitz complains that the Sixth Circuit has acted beyond its jurisdiction, Petition at 10-13, the Petitioner is clearly in error. It is beyond dispute that the Sixth Circuit has the authority to inquire into the issue of fraud on the Court. Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991); Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). Petitioner labors the question of Mr. Demjanjuk's possible stake in this proceeding, but ignores that the question before the Sixth Circuit is simply whether it was defrauded. Public faith in the judiciary is reaffirmed by assiduous analysis of possible fraud on the court.

IV. The equities of this case favor a speedy resolution of this dispute and militate against the issuance of an extraordinary writ of mandamus.

While mandamus is available only in an action at law, it is governed by equitable principles. Stern v. South Cester Tube Co., 390 U.S. 606, 609 (1968). "[Mandamus] may be refused for reasons comparable to those which would lead a court in equity, in the

exercise of its sound discretion, to withhold its protection of an undoubted legal right." United States v. Dern, 289 U.S. 352, 359 (1933). See also In re First Federal Sav. and Loan Ass'n of Durham, 860 F.2d 135, 140 (4th Cir. 1988)(court should not overlook principles of fairness when they are enmeshed in mandamus considerations); DeGaston v. Dillon, 247 F.Supp. 511 (1963) affirmed sub. nom Degaster v. Fowler, 354 F.2d 515 (D.C. Cir. 1955)(mandamus denied because plaintiff came into court with unclean hands).

Petitioner Moscowitz claims that the Sixth Circuit's investigation would harm his reputation and possibly lead other bodies to institute disciplinary sanctions against him. Petition at 5. By contrast, Mr. Demjanjuk is currently in Israel locked in solitary confinement under a death sentence. It is ludicrous for a former employee of the United States government to claim that the potential for reputational injury merits further delay so that the Sixth Circuit may reconsider its procedures while John Demjanjuk's life quite literally may hang in the balance. A speedy determination by the Sixth Circuit could have great significance, legal and diplomatic, to the proceedings in that country.

Beyond the reality of Mr. Demjanjuk's incarceration in solitary confinement under 24-hour surveillance is a simple yet powerful principle: justice delayed is justice denied. For the past fifteen years John Demjanjuk and his family have lived under the accusation that Demjanjuk was "Ivan the Terrible"--one of the most sadistic and ruthless mass-murderers in human history. This

was the offense for which Mr. Demjanjuk was extradited and for which the Rule of Specialty allowed him to be tried, convicted and sentenced to death in Israel. In a similar vein, public dissatisfaction with the fairness and propriety of its courts and government litigators must be resolved in a timely fashion.

A court should not act on a request for mandamus where the equities do not favor issuance of the writ. Petitioner Moscowitz claims to be fearful that a federal court will determine that he or his colleagues acted fraudulently in proceedings that led to extraditing John Demjanjuk for crimes the evidence now shows another person committed.[8] Moscowitz petitions the Court to issue a writ of mandamus stopping further investigation by a federal court into petitioner's own conduct. Issuance of mandamus in such a circumstance runs counter to all principles of equity. The court should exercise its sound discretion and withhold the requested writ.

Conclusion

For the foregoing reasons, this Court should deny Norman Moscowitz's petition for a writ of prohibition or mandamus.

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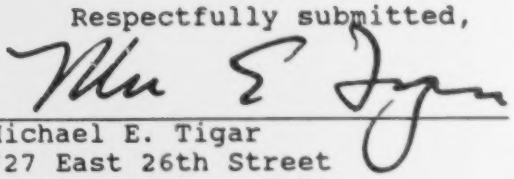
[8]In his own testimony, however, Petitioner seemed to deny that he partook in any wrongdoing. Were this believed, Petitioner's testimony would present, obviously, no danger to his reputation at all.

Respectfully submitted,



Michael E. Tigar
727 East 26th Street
Austin, Texas 78705
(512) 471-6319
(Counsel of Record)

Edward F. Marek
Office of the Federal Defender
Skylight Office Tower
Suite 750
1660 West 2nd Street
Cleveland, Ohio 44113-1454
(216) 522-4856

Attorneys for John Demjanjuk
Respondent

Nos. 92-1350 and 92-1447

In the Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE L. PARKER, PETITIONER

v.

GILBERT S. MERRITT, DAMON J. KEITH, AND PIERCE LIVELY

NORMAN A. MOSCOWITZ, PETITIONER

v.

GILBERT S. MERRITT, DAMON J. KEITH, AND PIERCE LIVELY

ON PETITIONS FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a nonparty witness who has testified before a special master appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure to hear a reopened extradition proceeding has the right to challenge the order appointing the special master.

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals appointing a special master (92-1350 Pet. App. A9-A16), the order of the court of appeals denying petitioner George Parker's motion to rescind its order appointing a

special master (92-1350 Pet. App. A73-A74), and the order denying petitioner Norman Moscowitz's suggestion for hearing en banc (92-1447 Pet. App. A2) are unreported.

JURISDICTION

The order of the court of appeals denying petitioner Parker's motion to rescind its order appointing a special master was entered on November 4, 1992. The order of the court of appeals denying petitioner Parker's suggestion for rehearing en banc and petitioner Moscowitz's suggestion for hearing en banc was entered on December 2, 1992. The petition for a writ of mandamus or prohibition in No. 92-1350 was filed on February 1, 1993, and the petition for a writ of mandamus or prohibition in No. 92-1447 was filed on March 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

1. On June 23, 1981, after a bench trial, the United States District Court for the Northern District of Ohio issued an order revoking the certificate of naturalization of John Demjanjuk. See *United States* v. *Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982). Subsequently, the United States initiated deportation proceedings against Demjanjuk, and in 1984, he was ordered deported. *Matter of Demjanjuk*, A8 237 417 (Immigration Court May 23, 1984), aff'd, (BIA Feb. 14, 1985), aff'd, *United States* v. *Demjanjuk*, 767 F.2d 922 (6th Cir. 1985) (Table), cert. denied, 474 U.S. 1034 (1985).

In November 1983, the State of Israel requested Demjanjuk's extradition to stand trial for violations of Israeli's Nazis and Nazi Collaborators (Punishment) Law. *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 550-552 (N.D. Ohio 1985). The extradition court found sufficient evidence to believe that Demjanjuk had committed the crimes charged, and it certified that Demjanjuk was subject to extradition to Israel. Thereafter, the district court denied a petition for habeas corpus seeking to block Demjanjuk's extradition to Israel. *Demjanjuk* v. *Petrovsky*, 612 F. Supp. 571, 577 (N.D. Ohio 1985), aff'd, 776 F.2d 571, 576 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986).[1]

2. On June 5, 1992, the panel of the court of appeals that had affirmed the order denying Demjanjuk's petition for habeas corpus challenging his extradition to Israel issued an order stating that based on its "previous study of the record and numerous press reports," it had decided to give "[c]onsideration * * * to whether this court's refusal to grant the petition for writ of habeas corpus was erroneous." 92-1350 Pet. App. A1-A2. The order directed the government and Demjanjuk to file briefs setting forth the evidence bearing on the question whether Demjanjuk was the Treblinka guard known as Ivan the Terrible or whether another man, Ivan Marchenko, was that guard.[2] In addition, the court ordered the parties to

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[1] In April 1988, an Israeli court found Demjanjuk guilty of crimes against the Jewish people, crimes against humanity, war crimes, and crimes against persecuted peoples at the Treblinka and Sobibor death camps, in violation of Israel's Nazis and Nazi Collaborators (Punishment) Law.

[2] During the course of Demjanjuk's appeal to the Supreme Court of Israel, the Israeli prosecutor submitted to that court

file a second brief on "the question whether the Court should reconsider its earlier decision concerning the issuance of a writ of habeas corpus in this case." *Id.* at A4.

In response to those orders, the United States filed a brief setting forth the evidence in its possession bearing on Demjanjuk's activities during the war and the identity of the operator or operators of the gas chamber at Treblinka. In addition, however, the government asserted that Demjanjuk's extradition to Israel had deprived the court of appeals of authority or jurisdiction to reopen the habeas corpus proceedings rising out of Demjanjuk's extradition.

On August 17, 1992, the court of appeals issued an order rejecting the government's jurisdictional arguments and designating a special master to determine "whether this court mistakenly affirmed the district court's denial of John Demjanjuk's habeas corpus petition." 92-1350 Pet. App. A9-A10. The court held that it had the authority to reopen the proceeding to determine whether government attorneys had perpetrated a fraud on the court by withholding evidence. The court ordered the special master to take the testimony of four Department of Justice attorneys involved in proceedings against

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evidence obtained from Soviet Union files containing statements of Red Army soldiers who became concentration camp guards after being captured by the Germans. In some of the Soviet statements, former guards at the Treblinka death camp stated that a Ukrainian named Ivan Marchenko operated the gas chambers at Treblinka. The Israeli Supreme Court has agreed to consider all of the new evidence. As of yet, that court has not rendered a decision on Demjanjuk's appeal.

Demjanjuk: Allan A. Ryan, Jr., Norman A. Moscowitz, George L. Parker, and John J. Horrigan. The court of appeals' order then directed the special master to report to the court of appeals on the question whether Department of Justice attorneys "engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as 'Ivan the Terrible' who operated the gas chambers at the Treblinka." *Id.* at A10, A15.

4. Pursuant to the court of appeals' order, the special master, Judge Thomas A. Wiseman of the United States District Court for the Middle District of Tennessee, scheduled hearings to take the testimony of the attorneys named in the court of appeals' order.[3] Counsel for Demjanjuk subpoenaed petitioners George L. Parker and Norman A. Moscowitz to testify before the special master on November 11 and 12, 1992.[4]

On October 28, 1992, petitioner Parker filed a motion requesting the court of appeals to rescind its order of August 17, 1992, appointing a special master. Parker argued that in the absence of exceptional circumstances, the court of appeals lacked authority under Rule 53 of the Federal Rules of Civil Procedure

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[3] In addition to the four attorneys named in the court of appeals' order, the special master also has heard the testimony of Martin Mendelsohn and Bruce Einhorn, two other Department attorneys involved in the proceedings against Demjanjuk, and has authorized the parties to take depositions of other witnesses.

[4] Moscowitz's testimony later was rescheduled to January 14 and 15, 1993.

to appoint a special master and that no exceptional circumstances justifying the appointment of a special master existed in this case. At the same time, Parker filed a motion with the special master seeking to stay the subpoena. On October 30, 1992, the special master denied the motion for a stay, and on November 4, 1992, the court of appeals denied the motion to rescind its August 17, 1992, order. The court of appeals' order stated: "[t]he Court for the reasons previously stated regards this case as exceptional and therefore declines to rescind its earlier order." 92-1350 Pet. App. A73. On November 6, Parker filed a suggestion for rehearing en banc of the court of appeals' November 4 order, and on November 10, Parker again sought a stay of the hearing scheduled for November 12 before the special master. The court of appeals denied the motion to stay on the same day that it was filed; the court denied the suggestion for rehearing en banc on December 2, 1992.[5]

On November 5, 1992, petitioner Moscowitz filed a motion to quash the subpoena directing his appearance before the special master and a suggestion for hearing en banc of his motion to quash. Moscowitz argued, among other things, that Demjanjuk's extradition deprived the court of appeals of jurisdiction, that Demjanjuk had failed as a matter of law to make allegations showing fraud on the court, and that the court had improperly expanded the scope of the proceeding to include the denaturalization and depor-

[5] Subsequently, Parker applied to this Court for a stay of the court of appeals' order dated August 17, 1992. Justice Stevens denied the application on March 18, 1993. *In re George L. Parker*, App. No. A-705.

tation proceedings against Demjanjuk. On December 2, 1992, the court of appeals denied those motions in the same order in which it denied Parker's suggestion for rehearing en banc.

3. On November 12 and 13, 1992, Parker traveled from his home in Rochester, New York, and appeared before the special master in Nashville, Tennessee. During hearings held on those dates, petitioner testified regarding his participation in the proceedings against Demjanjuk. Similarly, on January 14 and 15, 1993, Moscowitz traveled to Nashville from Miami, Florida, and testified before the special master.

ARGUMENT

Petitioners request this Court to issue a writ of mandamus or prohibition directing the court of appeals to rescind its August 17, 1992, order appointing a special master. In support of their request, petitioners renew the claims that they asserted before the special master and the court of appeals.[6] Petitioners are not entitled to relief for several reasons.

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[6] Parker argues that the court of appeals lacked authority under Rule 53, Fed. R. Civ. P., to appoint a special master and that the court of appeals should have remanded the matter to the district court. 92-1350 Pet. 24-49. Moscowitz joins in those claims and also asserts that Demjanjuk's extradition to Israel deprived the court of appeals of jurisdiction, that the court of appeals' procedure for investigating the allegation of fraud on the court violates the due process rights of the attorneys named in the court's order, and that Demjanjuk's allegations do not establish a prima facie case of fraud on the court. 92-1447 Pet. 10-29.

First, petitioners lack standing to raise their claims. The proceeding that petitioners seek to terminate originated as a petition for a writ of habeas corpus brought by John Demjanjuk against his custodians, who were officers of the United States.[7] Petitioners were not parties to the habeas proceeding, and, as petitioners concede (92-1350 Pet. 17; 92-1447 Pet. 3), they did not become parties when the court of appeals purported to reopen the habeas proceeding by appointing a special master in 1992. Neither petitioner has taken any steps to intervene in the original habeas proceeding. See Fed. R. Civ. P. 24; *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 548 n.9 (1986).

Moreover, the relief that Demjanjuk has sought in the court of appeals and before the special master relates primarily to his extradition to Israel.[8] Demjanjuk has not sought any relief against either petitioner, and in fact has reaffirmed in his briefs in opposition to the instant petitions (92-1350 Demjanjuk Br. in Opp. 5; 92-1447 Demjanjuk Br. in Opp. 6) that "[t]he crux of the dispute in this case is whether judicial approval under 18 U.S.C. § 3184 for Mr.

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[7] Demjanjuk brought his habeas petition against the custodian of the federal prison where he was being held at the time, the Attorney General of the United States, the Secretary of State, and the United States District Court for the Northern District of Ohio.

[8] Demjanjuk's second brief to the court of appeals asked the court to vacate the judgments in the denaturalization, deportation, and extradition cases against Demjanjuk and to issue an order directing the United States to use its best efforts to seek the return of Demjanjuk to the United States. Demjanjuk 2d C.A. Br. 60-61.

Demjanjuk's extradition to Israel was improperly procured by the Justice Department." Accordingly, because petitioners are not parties to the proceedings and because no relief is sought against them, they have no standing to file a motion seeking reconsideration of the order appointing the special master. See *Karcher* v. *May*, 484 U.S. 72, 77 (1987).

Second, neither petitioner has taken appropriate action to perfect his claim. Nonparty witnesses, such as petitioners, who wish to challenge the validity of a subpoena directing either testimony or the production of documents must move to quash the subpoena. If the court issuing the subpoena denies the motion to quash, the subpoenaed person may either comply with the subpoena or refuse to comply with the subpoena and suffer contempt. The person resisting the subpoena may obtain review of the subpoena on appeal from the contempt citation. See *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 326-327 (1940). Failure to resist the subpoena and suffer contempt precludes the subpoenaed individual from obtaining review of the validity of the subpoena. *Alexander* v. *United States*, 201 U.S. 117, 121 (1906); see 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.13[2], at 123 (1993).[9]

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[9] This case does not implicate the narrow exception to that rule for "disinterested third parties." *Church of Scientology* v. *United States*, 113 S. Ct. 447, 452 n.11 (1992); see *Perlman* v. *United States*, 247 U.S. 7 (1918). Petitioners clearly view themselves as having a "sufficient stake in the proceeding to risk contempt by refusing compliance," 113 S. Ct. at 452 n. 11; and they are required to pursue the ordinary steps required to appeal. See *FTC* v. *Alaska Land Leasing, Inc.*, 778 F.2d 577

In this case, both petitioners were subpoenaed to appear before the special master. The appropriate method to challenge the subpoena—and the order appointing the special master—was a motion to quash. Parker's failure to take this step precludes him from obtaining review by this Court.[10] *Alexander* v. *United States*, 201 U.S. at 121-122 (witness may not obtain appellate or Supreme Court review of an order requiring production of documents before a special examiner unless he disobeys the order and suffers contempt). Although Moscowitz filed a motion to quash the subpoena, he did not refuse to appear when the motion to quash was denied. Instead, he complied with the subpoena and appeared to testify before the special master. For that reason, he also is barred from raising his current claims in this Court.

Petitioners claim that they may suffer injury if the special master finds that they engaged in a fraud on the court and thus that they should be granted standing to challenge the order appointing the special master. That contention is beside the point. Petitioners had an avenue to raise their claims and protect their interest; they have simply failed to make

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(10th Cir. 1985); 15B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3914.23, at 148 n.54 (2d ~~Cir~~. 1992) (collecting cases). *ED.*

[10] Petitioners' position is further weakened by two other factors. First, the subpoenas were ineffective to compel their attendance before the special master. Parker works and resides in Rochester, New York, and Moscowitz works and resides in Miami, Florida. Thus, neither may be compelled to appear before a special master in Nashville, Tennessee. See Fed. R. Civ. P. 45. Second, petitioners have already complied with the subpoenas.

use of it. Having failed to invoke the appropriate route to perfect a right to appeal, petitioners may not circumvent that failure by requesting the issuance of an extraordinary writ. *Will* v. *United States*, 389 U.S. 90, 97 (1967) ("Mandamus, of course, may never be employed as a substitute for appeal * * * ."); *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947) ("Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * We are unwilling to utilize them as substitutes for appeals."); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943) ("Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record.").

The cases on which petitioners rely (92-1350 Pet. 18-20; 92-1447 Pet. 3-5) to support their claim to standing to challenge the court of appeals' order appointing the special master are inapposite. In each of those cases, a court allowed an appeal by a person who had effectively become a party in the underlying action. None of those cases involved a subpoenaed witness, such as petitioners, who had an adequate means of obtaining review of the validity of their subpoenas. Moreover, to reiterate, petitioners are not parties to this proceeding, and they have not been treated as parties.[11]

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[11] The United States has not abandoned its claim that the court of appeals lacked jurisdiction to reopen the extradition proceedings or to appoint a special master. Instead, the government has deferred seeking review of the court of appeals' interim order reopening the extradition proceeding and appointing a special master until the court of appeals panel reaches a final decision. Moreover, the government believes

CONCLUSION

The petitions for a writ of mandamus or prohibition should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

APRIL 1993

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that Demjanjuk has produced no evidence either in the court of appeals or before the special master showing a fraud on the court. Thus, the government's cooperation with the special master and its opposition to these petitions do not constitute a waiver of its jurisdictional arguments.

Supreme Court, U.S.
FILED
MAY 13 1993
OFFICE OF THE CLERK

Nos. 92-1350 and 92-1447

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

In re GEORGE L. PARKER,

Petitioner,

v.

GILBERT S. MERRITT, DAMON J. KEITH, and PIERCE LIVELY,

Respondents.

In re NORMAN A. MOSCOWITZ,

Petitioner,

v.

GILBERT S. MERRITT, DAMON J. KEITH, and PIERCE LIVELY,

Respondents.

ON PETITIONS FOR
A WRIT OF PROHIBITION OR MANDAMUS TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BY PETITIONERS

Charles P. Goodell, Jr.
(Counsel of Record)
Ernest G. Barnes
Geraldine Valentino
Goodell, DeVries,
Leech & Gray
25 Charles St. Suite 1900
Baltimore, Maryland 21201
(410) 783-4000
Counsel for
George L. Parker

Gerald J. Houlihan
(Counsel of Record)
David T. Azrin
Greenberg, Traurig,
Lipoff, Rosen &
Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500
Counsel for
Norman A. Moscowitz

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ARGUMENT

I. Petitioners Have a Sufficient Personal Stake in the Proceeding to Obtain Standing.

Contrary to the arguments of the Respondents, Petitioners have a sufficient personal stake in this proceeding to obtain standing. In his Brief in Opposition, Demjanjuk concedes that "in some circumstances a stigmatizing injury might be sufficient to support standing." (citing *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984)). Brief in Opposition, at 5. Here, the outcome of this proceeding may have a direct effect on the Petitioners' livelihood.

Contrary to the Respondents' suggestion, Demjanjuk is not simply seeking the reversal of the Sixth Circuit's order permitting the extradition. Rather, he seeks specific findings of attorney misconduct which he seeks to use to obtain automatic reversal of the Sixth Circuit's order. *See* Demjanjuk's Proposed Findings of Fact, at 157 (arguing that "once fraud is shown, vacatur is required"). The Sixth Circuit's stated purpose is to determine whether the attorneys, Allan Ryan, Norman Moscowitz, George Parker and John Horrigan, engaged in "prosecutorial misconduct." *See* Orders, Aug. 17, 1992, Aug. 31, 1992.[1/] While these attorneys were called as witnesses in the proceeding below, the entire proceeding has been directed toward determining whether each of these attorneys violated his individual professional obligations.[2/] At the close of the evidence, Demjanjuk

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[1/] The personal nature of the proceeding is evidenced by the Sixth Circuit's insistence on naming the individual attorneys involved. Normally, a judicial inquiry into alleged prosecutorial misconduct does not involve the public naming of the attorney involved. *United States v. Modica*, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[2/] For example, at the initial oral argument, the panel of the Sixth Circuit questioned counsel for the United States about the particular role of each government attorney, including the Petitioners. Transcript, Aug. 11, 1992, Tape 2, at 4-6, 14-15, 28-29; Tape 3, at 4. At the special master hearing, Parker and Moscowitz were each questioned by Demjanjuk's counsel and the United States, as well as the Special Master, as to whether they had violated particular ethical rules. Hearing, Vol. I,

has submitted proposed findings of fact which include specific findings that Parker and Moscowitz violated their professional ethical obligations.[3/] Demjanjuk has succeeded in "turn[ing] the trial of the accused into a trial of government counsel." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 636 (2d Cir.), *cert denied*, 329 U.S. 742 (1946). Such findings would have a direct and substantial impact on the Petitioners' reputation and profession. As Petitioners have maintained, the Department of Justice cannot adequately protect the interests of the individual attorneys. In these circumstances, the Petitioners' personal stake in these proceedings is very real.

II. This Court Has Authority to Issue a Writ of Prohibition or Mandamus to the Sixth Circuit Court of Appeals at This Stage in the Proceeding.

Contrary to the Respondents' arguments, there is no procedural bar to the issuance of a writ of prohibition or mandamus to the Sixth Circuit. In their Briefs in Opposition, Respondents mistakenly rely on a line of cases, including *United States v. Ryan*, 402 U.S. 530 (1971), *Cobbledick v. United States*, 309 U.S. 323 (1940), and *FTC v. Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985), for the proposition that a nonparty witness is not entitled to seek Supreme Court review without being held in contempt.

Nov. 12, 1992, at 49-51, 54-55, 122-124, 126-132, 185-187, 196-197; Vol. II, Nov. 13, 1992, at 38-39, 48-49, 73-74; Vol. III, Jan. 14, 1993, at 45-46, 127-128, 146-147, 152-153; Jan. 15, 1993, at 214-220, 238-246. At the closing argument before the special master on April 30, 1993, Demjanjuk's lawyer urged that the special master make separate determinations that Moscowitz and Parker, among others, each violated their personal ethical obligations.

3/ Demjanjuk's proposed findings include findings that Parker, Moscowitz, and others consciously disregarded their ethical obligations under the Model Code of Professional Responsibility (1980) EC 7-14 and 7-20. As legal authority for these findings, Demjanjuk relies upon the provisions of the Model Code, various court decisions addressing ethical duties, and various treatises on legal ethics. (Proposed Findings, March 29, 1993, at 112-121).

Respondents' reliance on this authority is misplaced because these cases involve review of the issuance of subpoenas by district courts, rather than circuit courts of appeals. Section 1291, 28 U.S.C., grants automatic review as of right of district court decisions by the circuit courts of appeal only where the district court decision is considered "final." This statutory provision has been interpreted to require that a nonparty witness can only obtain circuit court appellate review as of right if the witness goes into contempt. The courts impose this "finality" requirement to limit "the harassment and cost of a succession of separate appeals from various rulings to which a litigation may give rise." *Cobbledick*, 309 U.S. at 325.

In contrast, Supreme Court review of circuit court orders is not limited to "final" decisions. R. L. Stern, E. Gressman, S. M. Shapiro, *Supreme Court Practice*, § 4.18 (6th ed. 1986). Rather, the Supreme Court is authorized under the All Writs Act and the Supreme Court Rules to review any circuit court order on a petition for writ of prohibition or mandamus if such review is in aid of the Court's appellate jurisdiction to correct a clear abuse of judicial discretion or usurpation of judicial power, regardless of whether the order is considered "final." *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Maryland v. Soper*, 270 U.S. 9 (1926); *Perlman v. United States*, 247 U.S. 7 (1918); 28 U.S.C. § 1651; Supreme Court Rules 10, 20.

Here, Petitioners were faced with an order by the Sixth Circuit which compelled their compliance with the Sixth Circuit's subpoena. In this situation, the Petitioners should not have been required to be held in contempt prior to obtaining Supreme Court review because this Court's discretionary review authority does not depend on whether the circuit court order is final. Because the fact-finding investigation was improperly being conducted by the Sixth Circuit[4/]

[4/] Petitioners have urged that this proceeding should have been remanded to the District Court in the first instance.

rather than the District Court, the Petitioners' only avenue to obtain appellate review was by discretionary Supreme Court review.[5/]

Contrary to the Respondents' claim, the fact that the Petitioners' have already testified does not moot their claims. Petitioners did not object merely to the fact that they were required to give testimony. Rather, they objected to the Sixth Circuit's authority and jurisdiction to conduct the entire proceeding.[6/] A federal court is permitted to consider its own jurisdiction at any stage in the proceeding, on its own motion or at the suggestion of the parties. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939); *Dunton v. County of Suffolk*, 729 F.2d 903, 910 (2d Cir. 1984). The fact that

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[5/] Contrary to the Respondents' suggestion, allowing the Petitioners to obtain Supreme Court review in this case will not open the door for every witness appearing before a district court to obtain appellate review without being held in contempt. Rather, the rule urged here will only apply in the future where: (1) a circuit court, rather than a district court, is conducting a fact-finding investigation and issues an order compelling compliance with its subpoena, and (2) Supreme Court review is authorized under the Court's discretionary authority on the ground that the circuit court is acting beyond its judicial power.

[6/] Demjanjuk mischaracterizes the Petitioners' objections when he suggests that the Petitioners objected to the proceeding because they were concerned about the possible adverse publicity which might surround their testimony. See Brief in Opposition to Parker Petition, at 17-18, Brief in Opposition to Moscowitz Petition, at 11-12 (arguing that Petitioners' objections are moot because "[t]his testimony was widely covered in the national press" and "all of the evidence surrounding his involvement with the Demjanjuk case is now a matter of public record"). Their objection was specifically to having to testify in this proceeding.

Moscowitz and Parker object to the Sixth Circuit proceeding because: 1) the Sixth Circuit does not have jurisdiction to reopen the habeas corpus proceeding after Demjanjuk has already been extradited to stand trial in Israel; 2) the Sixth Circuit improperly delegated the proceeding to a special master; 3) the Sixth Circuit failed to remand the investigation to the District Court to conduct the investigation in the first instance; 4) the Sixth Circuit has failed to protect the due process rights of the individual attorneys because of its denial of certain procedural safeguards; and 5) the Sixth Circuit has improperly given Demjanjuk the lead role as the "prosecutor" in conducting the investigation.

the Petitioners have already testified does not moot the Petitioners' substantive objections to the Sixth Circuit's jurisdiction to conduct this proceeding. *Church of Scientology v. United States*, 113 S.Ct. 447, 452 (1992). Furthermore, Petitioners should not be required to await a decision by the Sixth Circuit before seeking Supreme Court review. This Court has authority to correct the Sixth Circuit's usurpation of judicial power before the Sixth Circuit proceeding continues any further.

Contrary to the Respondents' suggestion, Petitioners are permitted to obtain appellate review of the Sixth Circuit's actions even though they have not formally intervened as parties. A nonparty may appeal an order whenever he has an interest that is affected by the court's judgment and the equities weigh in favor of hearing the appeal. In these circumstances, the nonparty is not required to intervene as a formal party. *See, e.g., Perlman v. United States*, 247 U.S. 7 (1918); *United States v. International Brotherhood of Teamsters*, 931 F.2d 177, 183-84 (2d Cir. 1991); *United States v. Badger*, 930 F.2d 754, 756 (9th Cir. 1991); and cases cited in Moscowitz Petition, at 3 and Parker Petition, at 20-21.

CONCLUSION

For all of the foregoing reasons, Petitioners pray that this Court grant the Petitions for Writ of Prohibition or Mandamus.

Charles P. Goodell, Jr.
(Counsel of Record)
Ernest G. Barnes
Geraldine Valentino
Goodell, DeVries, Leech & Gray
25 S. Charles St. Suite 1900
Baltimore, MD 21201
(410) 783-4000
Counsel for
George L. Parker

Gerald J. Houlihan
(Counsel of Record)
David T. Azrin
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500
Counsel for
Norman A. Moscowitz

May 1993